(1)

90-611
No. _____

In the

Supreme Court of the United States

October Term, 1990

REGIS ANN GOULD,

PETITIONER

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; PUBLIC HEALTH SERVICE, etal.

RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Joseph C. Ruddy, Jr., Esquire
(Attorney of Record)
4314 Hamilton Street
Hyattsville, Maryland 20781
(301) 699-5666

Counsel for Petitioner

QUESTIONS PRESENTED

I. WHETHER THE MAJORITY OPINION OF THE CIRCUIT COURT OF APPEALS IN BANC ERRED BY HOLDING THAT THE STATUTE OF LIMITATIONS PROVISIONS OF THE FEDERAL TORT CLAIM ACT BEGINS TO ACCRUE EVEN BEFORE THE CLAIMANT BECOMES AWARE OF THE CRITICAL FACTS CONSTITUTING THE "CAUSE" OF AN ACTIONABLE INJURY, AND AS SUCH, IS IN CONFLICT WITH THIS COURT'S DECISION IN UNITED STATES V. KUBRICK, 444 U.S. 111 (1979)?

II. WHETHER THE MAJORITY OPINION OF THE CIRCUIT COURT OF APPEALS IN BANC ERRED BY ESTABLISHING AS A PRECEDENT THAT EVERY TORTFEASOR MUST BE PRESUMED A FEDERAL EMPLOYEE EVEN WHEN A CLAIMANT HAD NO INDICIA OF INFORMATION OR EVEN A HINT OF THE TORTFEASORS FEDERAL WORK

STATUS, AND BY DOING SO CONSTITUTES A VIOLATION OF THE PROVISIONS OF THE FIFTH (5TH) AND TENTH (10TH) AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND AS SUCH, REPRESENTS AN IMPORTANT FEDERAL QUESTION WHICH HAS NOT BEEN, BUT SHOULD BE SETTLED BY THIS COURT?

PARTIES TO THE PROCEEDING

Regis Ann Gould, as Parent, Guardian and Next of Friend of Aaron Russell Gould and Adrienne Marie Gould; as Special Administrator of the Estate of Gary Francis Gould; and Individually, Petitioners

United States of America, Respondent

United States Department of Health and Human Services, Public Health Service, Respondent

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The Memorandum and Order of the United States District Court for the District of Maryland dismissing the Petitioners' suit are setforth in Appendix A at pp. 1a-14a. The Memorandum and Order of the United States District Court for the District of Maryland denying the Petitioners' Motion to Alter or Amend are setforth in Appendix B at pp. 15a-20a.

The Majority and Dissenting Opinions of the Three Judge Panel of the United States Court of Appeals for the Fourth Circuit as reported at 884 F.2d 785 (4th Cir. 1989) are setforth in Appendix C at pp. 21a-75a.

The Order of the United States Court of Appeals for the Fourth Circuit In Banc granting Rehearing In Banc is setforth in Appendix D at pp. 76a-77a. The

Majority and Dissenting Opinions of the United States Court of Appeals for the Fourth Circuit In Banc are setforth in Appendix E at pp. 78a-119a.

JURISDICTION

The Judgment of the United States Court of Appeals for the Fourth Circuit In Banc vacating the Decision of the Three Judge Panel was entered on June 8, 1990. A timely Motion for Extension of Time to File Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit was filed before this Court on August 28, 1990, and an extension was granted through Saturday, October 6, 1990. This Court's Jurisdiction is invoked subject to the provisions of 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 28, United States Code, Chapter 161 -- United States as Party Generally -- Section 2401

(a) . . .

(b) A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

Title 28, United States Code, Chapter 171 -- Tort Claims Procedure -- Section 2679

(a) . . .

(b)(1) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee.

Constitution
of the United States of America.
Amendment V (1791)

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Constitution
of the United States of America.
Amendment X (1791)

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Annotated Code of Maryland, Courts and Judicial Proceedings Volume, Title V. Limitations and Prohibited Actions

Section 5-109. Actions against physicians.

An action for damages for an injury arising out of the rendering of or failure to render professional services by a health care provider, as defined in Section 3-2A-01 of this article shall be filed (1) within five years of the time the injury was committed or (2) within three years of the date when the injury was discovered, whichever is the shorter. If the claimant was under 16 years of age at the time the injury was committed, the time shall commence when he reaches the age of 16. Filing of a claim with the Health Claims Arbitration Office in accordance with Section 3-2A-04 of this article shall be deemed the filing of an action for purposes of this section. (1975, ch. 545, Section 1; 1976, ch. 235, Section 3).

STATEMENT OF THE CASE

The Petitioner, Regis Ann Gould, filed suit both individually, and in the dual capacity as Special Administrator of the Estate of her late husband, Gary Francis Gould, and as parent, next of guardian and next of friend of her minor children, Aaron Russell Gould and Adrienne Marie Gould.

The primary focus of the Petitioners' suit is a cause of action for wrongful death resulting from alleged medical negligence. The Petitioner contends that the original tortfeasor physicians held themselves out as employees of a private health maintenance organization located in Anne Arundel County, Maryland, and only after suit was filed in the State of Maryland was it disclosed that these employees were in fact federal employees who were working within the scope of their federal employment.

Due to federal jurisdiction the Petitioners' suit in a Maryland State Court was dismissed, and a subsequent Claim filed with the appropriate federal agency was denied. Thereafter, a suit filed before the United States District Court for the District of Maryland was

dismissed for failure to comply with the two (2) year Statute of Limitations Provisions of the Federal Tort Claims Act (hereinafter referred to as FTCA), 28 U.S.C Section 2401(b).

An appeal was taken before the United States Court of Appeals for the Fourth Circuit subject to the provisions of 28 U.S.C. Section 1291. A majority of a Three Judge Panel of the United States Court of Appeals for the Fourth Circuit reversed and remanded the holding of the District Court. The Panel Majority reasoned that the rational underling United States v. Kubrick, 444 U.S. 111 (1979), Wilkinson v. United States, 677 F.2d 998 (4th Cir. 1982), cert. denied, 459 U.S. 906 (1982), and Henderson v. United States, 785 F.2d 121 (4th Cir. 1986), persuaded the Panel Majority that the Plaintiffs'

claim did not accrue until she first learned that the primary treating physician was a federal employee (See Appendix C pp. 21a-75a).

A Dissent was filed which argued that the Opinion of the Panel Majority was not consistent with precedent established by the Supreme Court, the Fourth Circuit, and other Courts of Appeals. The dissenting jurist evidently felt so strongly about his opinion that he vacated the adjudicatory role of a jurist and undertook an adversarial role by initiating an investigation beyond the scope of the Record as regards an issue that was not contested between the parties and upon reflection still does not appear to be factually relevant (See Footnote 2 as setforth in Appendix C at p. 40a).

The Respondents timely filed a Petition for Rehearing with Suggestion of Rehearing In Banc which was granted by the full Circuit Court of Appeals.

The Majority Opinion of the Court of Appeals In Banc in essence adopted the original Dissent filed in the Decision of the Three Judge Panel and simultaneously relegated the Majority Panel Opinion to a Dissent In Banc. (See Appendix C pp. 21a-75a, and Appendix E pp. 78a-119a).

ARGUMENT I

I. WHETHER THE MAJORITY OPINION OF THE CIRCUIT COURT OF APPEALS IN BANC ERRED BY HOLDING THAT THE STATUTE OF LIMITATIONS PROVISIONS OF THE FEDERAL TORT CLAIM ACT BEGINS TO ACCRUE EVEN BEFORE THE CLAIMANT BECOMES AWARE OF THE CRITICAL FACTS CONSTITUTING THE "CAUSE"

OF AN ACTIONABLE INJURY, AND AS SUCH, IS IN CONFLICT WITH THIS COURT'S DECISION IN UNITED STATES V. KUBRICK, 444 U.S. 111 (1979)?

The Provisions of 28 U.S.C. Section 2401(b) of the Federal Torts Claims Act provides "a tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues (emphasis supplied)." The threshold issue in the instant case is to determine when a claim "accrues."

This Court addressed the issue of accrual under the FTCA in Kubrick v United States, 444 U.S. 111, 100 S.Ct. 349 (1979), and held as follows:

> **"We should also have in mind that the Act waives the immunity of the United States and that in construing the statute of limitations, which**

> is a condition of that waiver, we should not take it upon ourselves to extend the waiver beyond that which Congress intended. . . Neither, however, should we assume the authority to narrow the waiver that Congress intended. Indian Towing Company v. United States, supra." (See Kubrick supra, at 117-118).

An objective reading of this entire quotation would lead to an obvious conclusion that this Court basically stated that a reasonable and just construction of the FTCA would be applied, and that neither a strict nor a liberal construction of Congressional intent was to prevail.

A review of the facts in Kubrick, supra, establishes that the Petitioner was treated at a Veterans Hospital by a physician who was presumed to be a federal employee at a federal institution. The pertinent issue was not the identity of the tortfeasor, but

whether the knowledge on the part of the Appellant of a violation of a standard of medical care is required to commence the accrual of the statute of limitations provisions under the FTCA in a medical malpractice case.

Specifically, this Court stated:

> "We are unconvinced that for statute of limitations purposes a plaintiff's ignorance of his legal rights and his ignorance of the fact of his injury or its cause should receive identical treatment. That he has been injured in fact may be unknown or unknowable until the injury manifests itself; and the facts about causation may be in the control of the putative defendant, unavailable to the plaintiff or at least very difficult to obtain. The prospect is not so bleak for a plaintiff in possession of the critical facts that he has been hurt and who inflicted the injury." (See Kubrick supra, at 122).

It is obvious that this Court presumed that the Appellant knew the

exact legal identity of the potential defendant. If the exact legal identity of the tortfeasor is unknown, then the practical requirement for any party litigant of knowing whether the potential tortfeasor is an individual, or is the United States of America would be lacking, and the real "who" element of causation remains in the control of the putative defendant, unavailable to the plaintiff, or at least very difficult to obtain. An absence of this practical knowledge on the part of the prosecuting party would subject every Plaintiff to a potential dismissal for lack of appropriate jurisdiction in either a state or federal court, depending on the real "who" identity of the tortfeasor.

The Majority Opinion of the Circuit Court In Banc holds that the legal

identity of the tortfeasor is not an element of the "cause" of the plaintiff's injury as mandated in Kubrick supra. (See Footnote 2 in Appendix E at p. 97a). However, the In Banc Opinion fails to address the issue of how the FTCA accrual is tolled subject to Kubrick supra, because of the plaintiff's ignorance of the fact of his injury or its cause since such factors may be unknown or unknowable, or may be in the control of the putative defendant, but such tolling of accrual would not result from a putative defendants failure to disclose his real identity, or more importantly a defendants deliberate silence concerning his covert federal work status.

Common sense would dictate that when a patient-physician relationship develops exclusively from membership in

a private health maintenance organization, and the physicians in question render services only to members of the HMO and sign medical records and documents in behalf of the private medical facility without ever disclosing their covert identity as federal employees constitutes a luring falsehood that induces a continuing "passive misrepresentation" to the patient who reasonably assumes that the physician is an employee of the private medical facility.

A detailed review of the expressed and implied intent of the holding in Kubrick supra, establishes that the Opinion of the Panel Majority is in total compliance with the edicts of Kubrick as regards the "who" element of causation. The Panel Majority draws a direct linkage between Kubrick and two

precedent Fourth Circuit cases on point, namely, Wilkinson v. United States, 677 F.2d 998 (4th Cir. 1982), cert denied 459 U.S. 906 (1982), and Henderson v. United States, 785 F.2d 121 (4th Cir. 1986), and held that:

> "The rational underlying Kubrick, Wilkinson and Henderson persuades us that Gould's claim did not accrue until she first learned that O'Rourke, the primary treating physician was a federal employee. The Supreme Court held in Kubrick that a FTCA plaintiff need not be aware of the legal significance of the facts surrounding an injury in order for a claim to accrue. Kubrick's claim, therefore, accrued when he became aware of the facts relevant to the cause and existence of his injury even though he did not realize until much later that these facts could create a malpractice cause of action. Similarly, in Wilkinson and Henderson, the plaintiffs' causes of action accrued when they became aware or were put on inquiry notice that a government employee was involved in their injury even though they did not become

> aware of the legal consequences of that fact until much later. In this case, however, although Gould was probably aware soon after her husband's death that his death was caused by medical malpractice, she had no way of knowing that the principal causative actor contributing to his death was a government employee. She was, therefore, not "in possession of the critical fact[] . . . [of] who has inflicted the injury," Kubrick, 444 U.S. at 122, and, before the government informed Gould that O'Rourke was a federal employee, did not have any "knowledge to put [her] on inquiry." Wilkinson, 677 F.2d at 1002, or any "notice to prompt [her] to explore the legal ramifications of the government's involvement." Henderson, 785 F.2d 15 126." (See Appendix C at pp. 33a-35a).

This Court's holding in Kubrick clearly enunciates a paramount distinction between information that constitutes a factual predicate necessary for the Plaintiff to avoid ignorance of the facts of his injury or its cause as opposed to ignorance of his

legal rights (significance). As was cited previously this Court stated that "the facts of causation may be in the control of the putative defendant, unavailable to the plaintiff or at least very difficult to obtain." 444 U.S. at 122.

The legal significance of the Defendants being federally employed is a contingent issue that never can be addressed by a prosecuting party until the putative defendant has disclosed his real federal identity, or until as the Trial Court noted, "there was sufficient indicia of information available to the plaintiff to enable her to believe the federal government was involved." (See Appendix A at pp. 7a-8a).

It is undisputed that the treating physicians never disclosed their federal identity, and maintained at least a

"passive misrepresentation" by continuing to provide medical services full-time to patients of a private Health Maintenance Organization while simultaneously signing medical records and documents in the name of the HMO that further reinforced the implied and apparent representation of a private medical facility. As the Trial Court further noted, "there was no hint that, at the time of the decedent's death, (her husband) was being treated by federal employees." (See Appendix A at pp. 7a-8a).

Under similar circumstances of "misrepresentation" or "fraudulent concealment", in the post Kubrick era numerous appellate courts have held that the FTCA accrual cannot commence under such inequitable circumstances. See Barrett v. United States, 689 F.2d 324

(2nd Cir. 1982); Waits v. United States, 611 F.2d 550 (5th Cir. 1980); and Luizzo v. United States, 485 F.Supp. 1274 (D.C. Mich. 1980). Likewise, numerous post Kubrick decisions have also recognized that the FTCA accrual cannot commence when the identity of the Defendant as a federal employee could not have been known by the Appellant who initially filed suit in the State Court without first filing a claim with the respective federal agency. See Van Lieu v. United States, 542 F.Supp. 862 (N.D. N.Y. 1982); McGowan v. Williams 623 F.2d 1239 (7th Cir. 1980); Harris v. Burris Chemical, Inc., 490 F.Supp. 968 (N.D. Ga. 1980); and Chambly v. Lindy, 601 F.Supp. 959 (N.D. Ind. 1985).

These post Kubrick appellate precedents when viewed in light of the undisputed findings of fact by the Trial

Court lead to the unavoidable conclusion that the mandates of Kubrick would dictate a ruling not dissimilar to the holding of the Panel Majority which stated:

> "To deprive her of the federal cause of action under these circumstances would be both unfair and contrary to the Supreme Court's decision in Kubrick that the FTCA limitation period begins to run only when a claimant becomes aware of the "critical facts" constituting the "cause" of an actionable injury." (See Appendix C at p. 36a)

To do otherwise would not only violate the dictates of Kubrick on the issue of causative facts, but also would violate the clear mandate of Kubrick to maintain judicial restraint and avoid narrowing the scope of the FTCA waiver that Congress intended. Indian Towing Company v. United States, 350 U.S. 61,

68-69 (1955)(See Kubrick supra, at 117-118).

ARGUMENT II

II. WHETHER THE MAJORITY OPINION OF THE CIRCUIT COURT OF APPEALS IN BANC ERRED BY ESTABLISHING AS A PRECEDENT THAT EVERY TORTFEASOR MUST BE PRESUMED A FEDERAL EMPLOYEE EVEN WHEN A CLAIMANT HAD NO INDICIA OF INFORMATION OR EVEN A HINT OF THE TORTFEASORS FEDERAL WORK STATUS, AND BY DOING SO CONSTITUTES A VIOLATION OF THE PROVISIONS OF THE FIFTH (5TH) AND TENTH (10TH) AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND AS SUCH, REPRESENTS AN IMPORTANT FEDERAL QUESTION WHICH HAS NOT BEEN, BUT SHOULD BE SETTLED BY THIS COURT?

The keynote issue that distinguishes the Majority Opinion of the Three Judge Panel from the Majority

Opinion of the Circuit Court In Banc relates to whether the FTCA begins to accrue even when the Claimant was not in possession of the critical fact of who inflicted the injury.

The entire thrust of the Majority Opinion of the Circuit Court In Banc is based upon a presumption that a Claimant must presume that a tortfeasor may be a federal employee acting within the scope of their employment, and, as such, must undertake an investigation to rule out this possibility prior to filing suit (See Appendix E at pp. 105a-114a). Whereas, the Majority Opinion of the Three Judge Panel implicitly rejected the presumption of federal work status as regards every potential tortfeasor and concluded that the FTCA statute of limitations cannot begin to accrue until the claimant was in possession of the

critical facts of who inflicted the injury, or until the claimant had knowledge to put her on inquiry, or notice to prompt her to explore the legal ramifications of the government's involvement. (See Appendix C at pp. 33a-36a).

The Trial Court reached a finding of fact that it was undisputed that the petitioner never knew that the physicians who had treated her husband immediately prior to his death were employees of the federal government working within the scope of their employment.

Contrasting the instant case to Fourth Circuit precedent in Henderson, supra, the Trial Court stated as follows:

> "In rejecting the argument, the Henderson court determined that there was sufficient

> indicia of information available to the plaintiff to enable her to believe the federal government was involved. Of course, in this case, such information was not available to the plaintiff; that is, there was no hint that, at the time of her decedent's death, he was being treated by federal employees. . . ." (See Appendix A at pp. 7a-8a).

It is the Petitioner's contention that once a Trial Court reaches a conclusion that a prosecuting party had no reasonable knowledge, or even a hint that a federal employee was involved, that the provisions of the Tenth (10) and Fifth (5th) Amendments to the United States Constitution prohibit the application of a the lesser federal statute of limitation when a state statute of limitations was complied with by the prosecuting parties.

The Tenth (10) Amendment to the United States Constitution states as follows:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The Tenth Amendment (10th) was the last of the ten amendments originally identified as the "Bill of Rights" that were passed by the First Congress, and were adopted as a compromise in order to achieve Ratification of the original Constitution.

Constitutional scholar Bernard Schwartz in his treatise titled "The Bill of Rights: A Documentary History" explained the role of the Bill of Rights as a consideration in the Ratification process as follows:

> Historically, there is nothing as irrelevant as a lost constitutional cause--particularly one that was lost centuries ago. We tend today to ignore the writings of the Antifederalists and concentrate instead on what we consider the statesmanlike essays of their opponents: for it is hard for us to find merit in a political view which we consider so plainly wrong as that of opposition to the Constitution. The same should not, however, be true of the controversy over the absence of a Bill of Rights. Here, the Antifederalists had the stronger case and their opponents were on the defensive from the beginning. It was, indeed, not until the Federalists yielded in their rigid opposition on Bill of Rights amendments that ratification of the Constitution was assured." (See B. Schwartz, Volume I at p. 527).

Professor Schwartz further explains the paramount role of a Tenth Amendment like provision when he states:

> All eight of the states which proposed amendments (either officially or otherwise) recommended a provision like that ultimately included in

> the Tenth Amendment, reserving to the states powers not delegated to the Federal Government." (See B. Schwartz, Volume II at p. 983).

The practical affect of the Tenth (10th) Amendment is to conclude that any party has the right to presume that jurisdiction exists in a state court unless federal jurisdiction has been established by facts or circumstances that reasonably and rationally invoke federal law, or directly or by implication identify a federal employee or federal entity as a real party in interest.

The concept that there is a presumptive right of state jurisdiction was best explained by James Madison in his argument opposing the establishment of national bank where this leading Framer of the Constitution stated as follows:

> "After some general remarks on the limitations of all political power, he took notice of the peculiar manner in which the Federal Government is limited. It is not a general grant, out of which particular powers are excepted; it is a grant of particular powers only, leaving the general mass in the hands. So it had been understood by its friends and its foes, and so it was to be interpreted." (See History of Congress, House of Representatives, Bank of the United States, February 1791, at p. 1896).

In the case at hand the Petitioner had the right to presume that jurisdiction for medical negligence resided in the State of Maryland subject to the Provisions of Section 5-109 of the Courts and Judicial Proceedings Volume of the Annotated Code of Maryland. Section 5-109 sets a three (3) year Statute of Limitation period from the date that the injury was discovered, and it is undisputed that

the discovery of the injury took place on September 4, 1980, the date of the decedents death. The Plaintiffs filed suit prior to September 4, 1983, and fully complied with the Provisions of Section 5-109 as regards the Statute of Limitations in the State of Maryland.

The Tenth (10th) Amendment to the Constitution allowed the Petitioner to presume that jurisdiction resided in the Courts of the State of Marylan until disclosure of the federal employee status overcame that presumption.

The Majority Opinion of the Circuit Court In Banc completely undermines any presumptive state jurisdiction as setforth in the Tenth (10th) Amendment. The Opinion In Banc operates from the presumption that in spite of the Trial Court's finding that there was not even a hint that the treating physicians were

federal employees that there existed a presumptive obligation on the part of the Petitioner to undertake an investigation in order to ascertain if the tortfeasor was a federal employee.

This presumptive conflict with the expressed and implied edicts of the Tenth (10th) Amendment was best exemplified in Oral Argument before the Court of Appeals In Banc where an inquiring Jurist asked of Petitioners' Counsel why he had not undertaken an investigation to determine whether the physician-tortfeasors was a federal employee.

Petitioners Counsel responded that the Claimant and her decedent husband and family members had acquired the services of the physician-tortfeasors as members of a private health maintenance organization and that there existed

numerous medical records and documents that had been signed by the physicians in question in behalf of the health maintenance organization. Petitioners Counsel concluded by reciting an analogy that if he had been hit by a taxicab while crossing the street in Richmond prior to his entry into the Courthouse that he would not have presumed that the taxicab driver was a covert CIA agent working undercover. Counsel reiterated that he would not presume to undertake an investigation to determine the taxicab drivers potential covert federal work status.

The inquiring Jurist spontaneously responded that after the holding in this case Counsel better commence an investigation of every tortfeasor.

This exchange in Oral Argument lead to an inquiry by the Judge who had

written the Majority Opinion of the Three Judge Panel that questioned whether a National Registry of federal employees would have to be established if the Court In Banc were going to enforce the presumption that all tortfeasors must be presumed federal employees.

This presumptive obligation of every Plaintiff to rule out the federal work status of every tortfeasor reflects a perfect example of what many of the ratifications conventions of the various states feared would take place when a supreme federal jurisdiction presumptively overshadowed and eventually usurped all state jurisdiction.

The ultimate result of the Majority Opinion In Banc is to affirm dismissal of a suit for wrongful death of a young

father who had a wife and two (2) minor children under pleaded circumstances that appear to establish a prima facie case of medical negligence.

The sole reason for this affirmation of dismissal was the covert identity of a federal employee who once identified utilized federal jurisdiction to undermine, usurp and render useless the presumed jurisdictional authority of a state court. This type of subtle or remote usurpation of state jurisdiction violated the presumptive intent of the Framers. In February 1791 James Madison addressed this issue when he stated as follows:

> "The defence against the charge founded on the want of a bill of rights pre-supposed, he said, that the powers not given were retained; and that those given were not to be extended by remote (emphasis supplied) implications." (See History of Congress, House of

Representatives, Bank of the United States, February 1791, at p. 1901).

The presumptive safeguards of the Tenth (10) Amendment have been rendered useless, and those founding fathers who believed in the presumptive rights of the states worst fears have been realized.

It is noteworthy that Constitutional Scholar Schwartz addresses the role of the Federal Judiciary in protecting the Bill of Rights by stating as follows:

> Also included in Jefferson's letter to Madison of March 15, 1789, because it is in reply to Madison's letter of October 17, 1988, particularly to Madison's assertion that a Bill of Rights will be ineffective. Jefferson states that this is not true, for Madison omits to mention, in his arguments, "one which has great weight with me, the legal check which [a Bill of Rights] puts into the hands of the judiciary." The Jefferson assertion on the matter led

> Madison to emphasize, when he later presented his draft of the Bill of Rights to Congress, that the courts would enforce the limitations imposed in his proposed amendments (*infra* p. 1009)." (See Schwartz, Volume I at p. 593)

In addition to the Tenth (10) Amendment to the United States Constitution, the Fifth (5th) Amendment provides that whenever federal jurisdiction exists every citizen shall not be deprived due process of law.

The fact that the Petitioner has been denied her day in court, and a wrongful death suit has been dismissed and forever barred by a Federal Statute of Limitations in spite of having timely filed a suit in an appropriate Court in the State of Maryland in compliance with an applicable state Statute of Limitations constitutes a blatant and

egregious violation of due process of law.

Whenever a citizen complies with the statutory requirements for initiating a civil suit in a State wherein the facts do not raise even a hint that federal jurisdiction could arise, the invocation of federal jurisdiction subject to the protective provisions of the Tenth (10th) and Fifth (5th) Amendments of the United States Constitution cannot deny a party the prosecution of a cause of action unless facts known to the parties would have alerted a reasonable man to conclude that federal jurisdiction may exist.

The gross inequity and blatant denial of due process that is manifest by the present status of the Petitioners case is not consistent with the provisions of either the Tenth (10th),

or the Fifth (5th) Amendment to the United States Constitution.

When applying the various provisions of the United States Constitution and particularly the "Bill of Rights", the concepts of equity, fairness, and justice must dictate any judicial interpretation of the intended scope of the Framers. The Majority Opinion In Banc interpretation and application of the Statute of Limitations Provisions of the FTCA not only are violative of these constitutional concepts, but also create an end-result that is arbitrary, capricious, and irrational, and as such, fails to comply with the Constitution mandates of due process. See Duke Power Company v. Carolina Environmental Study Group, 438 U.S. 59, 98 S.Ct. 2620 (1978), and Usery v. Turner Elkhorn

Mining Company, 428 U.S. 1, 96 S.Ct. 2882 (1976).

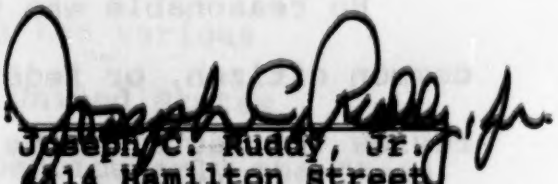
No reasonable man whether he be common citizen, or federal jurist could review the facts of the instant case and conclude that justice, equity, or fairness have been rendered to the Petitioner. Absent such a Conclusion the Decision of the Majority of the Circuit Court In Banc cannot stand.

CONCLUSION

Based upon the Findings of Fact and Conclusions of Law presented herein, the Petitioner hereby respectfully requests that this Court issue a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

LAW OFFICES
JOSEPH C. RUDDY, JR.

BY: 

Joseph C. Ruddy, Jr.
4814 Hamilton Street
Hyattsville, MD 20781
301-699-5666
Attorney for
Petitioners

CERTIFICATE OF MAILING AND SERVICE

I HEREBY CERTIFY that the required copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit was mailed, first-class mail, postage prepaid, this 9th day of October, 1990, to the Clerk's Office for the United States Supreme Court, Supreme Court Building, 1 First Street, N.E., Washington, D.C. 20543, and further CERTIFY that the required copies were mailed, first-class mail, postage

prepaid, this same date to Kenneth Starr, Solicitor General, Department of Justice, Constitution Avenue between 9th and 10th Streets, N.W., Washington, D.C. 20530, Attorney for Respondents.

BY: 
Joseph C. Ruddy, Jr.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

REGIS ANN GOULD, etc., et al.	:	
Plaintiffs	:	
v.	:	CIVIL NO. JH-87-473
UNITED STATES OF AMERICA, etc.	:	
Defendants	:	

MEMORANDUM

Plaintiff, Regis Ann Gould, individually, and as Special Administrator of the Estate of her deceased husband, Gary Francis Gould, and as Parent and Next Guardian to Aaron and Adrienne Gould, instituted the present action pursuant to the Federal Tort Claims Act ("FTCA"), 28 U.S.C. Sections 2671-2680, seeking to recover Twelve Million Dollars ($12,000,000.00) from the United States of America and

the U.S. Department of Health and Human Services and Public Health Services for the alleged negligent diagnosis, treatment and care of her decedent.

On August 27, 1980, the Decedent began to have a headache, fever, nausea, stiff neck and other symptoms which continued for the next two days. He called the South County Family Health Care Corporation in Anne Arundel County, Maryland and received an appointment for August 30, 1980 at 9:00 a.m. From that day forward, two doctors, Dr. O'Rourke and Dr. Nathanson, treated the decedent until he died on September 4, 1980 of Rocky Mountain Spotted Fever. He apparently died at Anne Arundel General Hospital.

Plaintiff is suing the United States because Drs. O'Rourke and Nathanson are employed by the federal

government. Dr. O'Rourke is a commissioned officer and Dr. Nathanson is a civilian employee of the Public Health Service in the National Health Service Corps. They treated the decedent because, pursuant to 42 U.S.C. Sections 254e and 254f, they were assigned to practice in a "health manpower shortage area" which, at the time, seems to have included Anne Arundel County, Maryland.

The government, pursuant to Fed. R. Civ. P. 12(b) (1), moves to dismiss plaintiffs' complaint because it believes this Court lacks jurisdiction over the subject matter of the complaint. In the alternative, the government moves for summary judgment, pursuant to Fed. R. Civ. P. 56. (Paper #3). Plaintiff responded (Paper #6), prompting the government's reply (Paper

#9). The matter is ripe for disposition and no hearing is necessary. Local Rule 6(G).

The government contends plaintiffs' complaint is barred by the applicable statute of limitations which, in this case, is 28 U.S.C. Section 2401(b). It provides that a tort claim against the United States is time barred unless presented in writing to the appropriate federal agency with two years after such claim accrues.

The FTCA's jurisdictional requirements must be strictly construed because it is a partial waiver of sovereign immunity. U.S. v. Kubrick, 444 U.S. 111, 117-18 (1979). The filing of an administrative claim with the appropriate federal agency is a jurisdictional prerequisite to filing

suit under the FTCA. Henderson v. U.S., 785 F.2d 121, 123 (4th Cir. 1986).

When a claim accrues is a question of federal law. Sexton v. U.S., 832 F.2d 629, 633 n. 4 (D.C. Cir. 1987); Wehrman v. U.S., 830 F.2d 1480, 1482-83 (8th Cir. 1987). Typically, a claim accrues when the injury or harm is inflicted. Wehrman v. U.S., 830 F.2d 1480, 1483 (8th Cir. 1987); Guccione v. U.S., 670 F.Supp. 527, 535 (S.D.N.Y. 1987). Medical malpractice disputes are not typical FTCA cases. As an exception to the rule, U.S. v. Kubrick, 444 U.S. 111, 125-26 (Stevens, J., dissenting); Wehrman v. US., 830 F.2d at 1483; Guccione, 670 F.Supp. at 536, the medical malpractice claim accrues when "the plaintiff has discovered both his injury and its cause." U.S. v. Kubrick, 444 U.S. 111, 120 (1979).

The government argues that plaintiff knew the cause and existence of her decedent's injury on the day he died--September 4, 1980 -- but did not file the administrative claim until August 2, 1985. Plaintiff vigorously disputes the September 4, 1980 date as the time of accrual but does not offer her version of the date when the action accrued. Her position seems to be that it accrued in 1983 when she determined that the doctors were working for the federal government.[1] Clearly, resolution of this motion turns on whether plaintiff's cause of action accrued on the 1980 date, making it time

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1 Plaintiff learned on September 26, 1983 that Dr. O'Rourke was a federal employee. She learned on December 16, 1983 that Dr. Nathanson was a federal employee.

barred, or whether it accrued in 1983 -- the date she learned the doctors were federal employees -- which would make for a timely filing.

Henderson v. United States, 785 F.2d 121 (4th Cir. 1986) controls the disposition of this case. In Henderson, a substitute U.S. mail carrier hit the plaintiff's car. Although the plaintiff knew that the vehicle which struck them may have been a government vehicle, she argued that her cause of action did not accrue until she ascertained that the driver was a federal employee. In rejecting the argument, the Henderson court determined that there was sufficient indicia of information available to the plaintiff to enable her to believe the federal government was involved. Of course, in this case, such information was not available to the

plaintiff; that is, there was no hint that, at the time of her decedent's death, he was being treated by federal employees. However, that is not fatal to the government's case because the Henderson court went on to hold that the cause of action accrued on the date of the collision. 785 F.2d at 126.

The Henderson holding applies here as well. Plaintiff's cause of action accrued on September 4, 1980. At that time, she was sufficiently armed with the knowledge of injury to her decedent and what caused it which is all that Kubrick demands.

Plaintiff contends that the statute of limitations should be tolled until the legal identity of the tortfeasor is known. Further, plaintiff argues that, because this is a medical malpractice case, the due diligence rule applies

which allows the cause of action to accrue only after the plaintiff, with due diligence, discovers the case's critical facts. Guccioni v. U.S., 670 F.Supp. 527, 536 (S.D.N.Y. 1987). But the rule's rationale in the malpractice cases rests upon the fact that a plaintiff's injury may be "unknown" or "inherently unknowable" when it occurs. Id.; see also, U.S. v. Kubrick, 444 U.S. 111, 127 n.3 (Stevens, J., dissenting).

The Court turns to plaintiff's argument that accrual is tolled until she ascertained the legal identity of the tortfeasor. While in some cases this argument may have some appeal, although none is found in Supreme Court or Fourth Circuit authority, it does not apply here.[2] Plaintiff failed to make

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2 Also see the discussion of then Circuit Judge and potentially Justice

any inquiry until August 8, 1983 about the doctor's employment status. Upon doing so, she was promptly informed of their status as federal employees. No impediment existed as to determining the doctors' legal identity. With the death and its cause discovered on September 4, 1980, due diligence is not present when an initial inquiry about who employed the tortfeasors is made 35 months later and then instituting the administrative tort claim two years after the inquiry.[3]

Kennedy in Dyniewickz vs. U.S., 742 F.2d at 486-87 (9th Circ. 1984).

3 The Court notes that typically due diligence is for the fact finder. U.S. v. Kubrick, 444 U.S. 111, 128 (Stevens, J., dissenting); Guccione v. U.S., 670 F.Supp. 527, 537 (S.D.N.Y. 1987). But where it is beyond dispute regarding knowledge of critical facts about a claim, summary judgment is proper. 670 F.Supp. at 537.

Plaintiff possessed enough critical facts in 1980 to seek advice from the medical and legal community about the prospect of filing a suit. 444 U.S. at 123; Sexton v. U.S., 832 F.2d 629, 663 (D.C. Cir. 1987). To relieve her now, through postponement of her cause of action based on an accrual problem, implicates the rationale mentioned in Kubrick which provided that doing so "would undermine the purpose of the limitations statute, which is to require the reasonably diligent presentation of tort claims against the Government." 444 U.S. at 123.

Accordingly, plaintiffs' complaint was filed untimely because it was not filed within two years after the claim accrued. 28 U.S.C. Section 2401(b). Since action is required within that time period as a condition of the waiver

of sovereign immunity, and therefore is jurisdictional, this Court is without jurisdiction to hear this matter.

The Court will enter a separate order.

Joseph C. Howard, U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

REGIS ANN GOULD, etc., et al.	:	
Plaintiffs	:	
v.	:	CIVIL NO. JH-87-473
UNITED STATES OF AMERICA, etc.	:	
Defendants	:	

ORDER

In accordance with the Memorandum of even date, it is this 19th day of January, 1988, by the United States District Court for the District of Maryland, ORDERED:

1) that defendants' motion to dismiss or, in the alternative, for summary judgment BE, and the same hereby IS, GRANTED;

2) that judgment BE, and the same hereby IS, GRANTED in favor of the

defendants and against the plaintiffs; and

3) that the Clerk mail copies of the Court's Memorandum and of this Order to all counsel of record.

Joseph C. Howard
United States District
Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

REGIS ANN GOULD, et al. :

Plaintiffs :

v. : CIVIL NO. JH-87-473

UNITED STATES OF AMERICA, et al. :

Defendants :

MEMORANDUM AND ORDER

Pending before the Court is plaintiff's motion to alter or amend this Court's Judgment embodied in an Order dated January 19, 1988. Plaintiff proceeds under Fed. R. Civ. P. 59(e).

"A motion to amend the judgment is appropriate if the court in the original judgment has failed to give relief on a claim on which it has found that the party is entitled to relief." 11 Wright and Miller, Federal Practice and Procedure Section 2817 at 111 (1973).

The anatomy of plaintiff's motion follows. In discussing the applicability of Henderson v. United States, 785 F.2d 121 (4th Cir. 1986), this Court stated that at the time of his treatment the decedent had "no hint" that his treating doctors were federal employees. Nonetheless, this Court dismissed the case. Accordingly, plaintiff implies that it was an act of judicial legerdemain for the Court, in one breath, to rule that plaintiff had no clue about his doctors' employer and, in the next breath, find that his cause of action accrued on September 4, 1980, when decedent died, rather than find the action accrued in August of 1983 when plaintiff ascertained the federal government might be implicated.

"A medical malpractice claim does not accrue under the FTCA until

plaintiff discovers, or reasonably should have discovered, his injury and its causes." Dearing v. United States, 835 F.2d 226, 228 (9th Cir. 1987) (emphasis supplied). The question presented in this motion is whether the emphasized portion of the quote above is capable of embracing two meanings. That is, does the word "cause" mean both the cause of his injury (i.e., Rocky Mountain Spotted Fever) and the identity of the tort-feasor, (i.e., the doctors employed by the federal government)? The Court believes Henderson answered this question in the negative. Unless the Court oversimplified the Fourth Circuit's holding, the Henderson court determined that the plaintiffs' cause of action accrued on the date of the injury. At that time, the Henderson plaintiff knew he was hurt and he knew

he was hit by a car. Therefore, when the action accrued was "apparent from the outset." 785 F.2d at 126.

The Court's conclusion is supported by Zeleznik v. United States, 770 F.2d 20 (3rd Cir. 1985, cert. denied, 475 U.S. 1108 (1986), a case which stated that "(t)he 'cause' is known when the immediate physical cause of the injury is discovered." 770 F.2d at 23. Similarly, the Court relies on Dyniewicz v. United States, 742 F.2d 484 (9th Cir. 1984), a case penned by now Justice Kennedy who determined that absence of any knowledge by plaintiff that the government was involved was simply not relevant.

Plaintiff also contends that he "had the right to presume that jurisdiction for medical negligence resided in the State of Maryland subject

to the provisions of Section 5-109 of the Courts (Article of Maryland)." Motion to Amend at 2-3. Md. Cts. & Jud. Proc. Code Ann. Section 5-109 provides for a three-year statute of limitations. There is some authority for the position that potential plaintiffs have a right to presume very little.

> (A)ny statute of limitations that puts inquiry burdens on a plaintiff, as this one clearly does, see Kubrick, 444 U.S. at 123 & n.10, 100 S.Ct. at 360 n.10, entails a degree of ghoulish behavior. Patients or survivors, whose instinct may well be to shut off from their minds the grim experience through which they have passed, are required instead to follow up on their leads. For persons of any sensitivity this must be a difficult or even repugnant process. Yet, to protect defendants from stale claims, legislatures put potential plaintiffs to the hard choice of proceeding with such inquiries or risking loss of possible claims.

Sexton v. United States, 832 F.2d 629, 636 (D.C. Cir. 1987).

Because plaintiff was aware of all the critical facts of her decedent's death on September 4, 1980, she has not presented a timely claim, the Court believes, under 28 U.S.C. Section 2401(b). Accordingly, the Court denies plaintiffs' motion to alter and amend judgment.

So ORDERED this 14th day of March, 1988.

Joseph C. Howard
United States District
Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-3091

REGIS ANN GOULD, as Parent Guardian and next of friend of Aaron Russell Gould and Adrienne Marie Gould, Regis Ann Gould, as Special Administrator of the Estate of Gary Francis Gould; REGIS ANN GOULD

Plaintiffs - Appellants,

v.

U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES; PUBLIC HEALTH SERVICE,

Defendants - Appellees.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Joseph C. Howard, District Judge. (CA-87-473JH)

Argued: December 5, 1988
Decided: September 8, 1989

Before SPROUSE AND CHAPMAN, Circuit Judges, and HAYNSWORTH, Senior Circuit Judge.

Joseph Cornelius Ruddy, Jr. (LAW OFFICES, JOSEPH C. RUDDY, JR., on brief) for Appellants. Sally Kraft Trebbe (Litigation Branch, Business and Administrative Law Division. DEPARTMENT OF HEALTH AND HUMAN SERVICES; Breckinridge L. Willcox, United States Attorney, Juliet Ann Eurich, Assistant United States Attorney, on brief) for Appellees.

SPROUSE, Circuit Judge:

Regis Ann Gould appeals from the district court's dismissal of her action against the United States under the Federal Tort Claims Act ("FTCA") on behalf of her deceased husband's estate, her children, and herself for the allegedly negligent medical care administered to her husband by government employees. The district court

held that Gould's claim was time barred under 28 U.S.C. Section 2401(b). We reverse and hold that Gould's claim was timely because that claim did not begin to accrue until she first learned that one of the treating physicians was a federal employee.

I

In her complaint, Gould alleges that her husband, Gary Francis Gould, began to experience headaches, fever, nausea, stiff neck, and other related symptoms on August 27, 1980. On August 30, when his symptoms continued, Mr. Gould was medically examined by James Kevin O'Rourke, M.D., at the South County Family Health Care Corporation, a private facility in Anne Arundel County, Maryland. O'Rourke diagnosed Mr. Gould's condition as a virus and instructed him to return home and to

seek bed rest and regular intake of liquids. That afternoon, when Mr. Gould's condition continued to deteriorate, O'Rourke directed him to a local hospital where he was admitted. On September 1, Barry Nathanson, M.D., another physician working for the South County Health Care Corporation, began to assist O'Rourke.

Although Mr. Gould's condition further worsened while he was hospitalized, O'Rourke continued to insist that the decedent was suffering from a virus and that no additional consultation was necessary. On September 3, after repeated demands by Mr. Gould's family, O'Rourke agreed to consult an internal medicine specialist. The specialist immediately diagnosed Rocky Mountain Spotted Fever and initiated antibiotic treatment, but Mr.

Gould died less than twenty-four hours later on September 4, 1980.

In August 1983, Mrs. Gould brought a medical malpractice suit before the Health Claims Arbitration Board of Maryland against O'Rourke and Nathanson for their alleged negligent care of her husband. This claim was filed within Maryland's three-year limitations period for medical malpractice claims. See Md. Ct. & Jud. Proc. Code Ann. Section 5-109. On September 26, 1983, during the course of that litigation, the government informed Gould's counsel that O'Rourke was a commissioned officer in the United States Public Health Service. Three months later, the government told Gould's counsel that Nathanson was a civilian employee with the Public Health Service.* Under the FTCA, federal

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* O'Rourke and Nathanson were working as federal employees in the private health facility for the South County Family Health Care Corporation under a government assignment to practice in a "health manpower shortage area" pursuant to 42 U.S.C. Sections 254e-254f.

district courts have exclusive jurisdiction over actions involving negligence by federal employees while acting within the scope of their employment, 28 U.S.C. Section 1346(b), and the United States is the proper defendant in such actions, 28 U.S.C. Section 2679. The Board accordingly dismissed Gould's action against O'Rourke and Nathanson on December 16, 1985, nearly two-and-a-half years after Gould initiated the state proceedings, finding that they were federal employees and, therefore, not subject to suit in a state forum.

On August 2, 1985, Gould filed a FTCA medical negligence claim with the Department of Health and Human Services,

Division of Public Health Service. In her claim, Gould stated that O'Rourke and Nathanson, although federal employees, had held themselves out as agents and employees of the private health facility. The Department denied Gould's tort claim on August 28, 1985, on the grounds that it was time-barred under the FTCA two-year statute of limitations, 28 U.S.C. Section 2401(b).

Gould initiated this present action in district court in February 1987. The court granted the government's motion to dismiss the action pursuant to rule 12(b)(1) of the Federal Rules of Civil Procedure, holding that Gould's claim had accrued on September 4, 1980, the date of her husband's death, and, therefore, it was barred under section 2401(b).

II

Under 28 U.S.C. Section 2401(b), "[a] tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues. . . ." The question of when a FTCA claim "accrues" under section 2401(b) was addressed by the Supreme Court in United States v. Kubrick, 444 U.S. 111 (1979). In that case, a Veterans Administration physician applied an antibiotic to Kubrick's leg as part of postoperative procedures. Kubrick soon noticed a loss of hearing, and in January 1969, another physician told him that the hearing loss was probably due to the antibiotic treatment. Not until 1971, however, did a physician tell Kubrick that the antibiotic treatment had been improper,

and Kubrick filed a FTCA claim within two years of that conversation. The government asserted that Kubrick's claim had accrued in January 1969 when he was informed that the antibiotic treatment had caused the hearing loss and, therefore, that his claim, filed in January 1973, was time barred. The district court and Third Circuit, however, rejected this contention, finding that Kubrick's cause of action did not accrue until 1971 when he learned that the antibiotic treatment had been improper.

The Supreme Court reversed. The Court distinguished between a plaintiff's ignorance of the facts concerning his injury or its cause and his ignorance of the legal significance of those facts and noted:

> That he has been injured in fact may be unknown or unknowable until the injury manifests itself; and the facts about causation may be in the control of the putative defendant, unavailable to the plaintiff or at least very difficult to obtain. The prospect is not so bleak for a plaintiff in possession of the critical facts that he has been hurt and who has inflicted the injury.

Id. at 122. The Court concluded, therefore, that "accrual" of an FTCA claim did not require awareness by the plaintiff that his injury was negligently inflicted and that Kubrick's claim had accrued in January 1969 when he came into possession of all the facts about the cause of his injury. Id. at 123.

Since the Supreme Court decided Kubrick, we have twice considered questions concerning when FTCA claims accrue under section 2401(b). In Wilkinson v. United States, 677 F.2d 998

(4th Cir.), cert. denied, 459 U.S. 906 (1982), a rental car driven by a sailor on business for the Navy collided with Wilkinson's automobile. At the time of the accident, Wilkinson knew that the other driver was employed by the Navy but not that the driver was on government business. In rejecting Wilkinson's argument that his claim did not accrue until he learned that the sailor was acting within the scope of his federal employment, we stated:

> In the instant case, the fact of injury and the identity of the person committing the injury were immediately beknownst. Plaintiff was possessed of sufficient knowledge to put him on inquiry as to whether (the sailor), a naval rating on active service, was operating within the scope of his employment.

Id. at 1002.

In Henderson vs. United States, 785 F.2d 121 (4th Cir. 1986), a car driven by a substitute United States mail carrier collided with Henderson's automobile, and the accident report indicated that the mail carrier's car was used by the government. Henderson contended that her claim did not accrue until nine months after the collision when the government informed her that the mail carrier was a federal employee acting within the scope of her employment. We held, however, that the accident report indicating the car was being used by the government "was sufficient notice to prompt (Henderson) to explore the legal ramifications of the government's involvement." Id. at 126. We concluded, therefore, that Henderson's claim had accrued on the date of the collision and held that her

FTCA claim, filed twenty-seven months after that date, was time-barred under section 2401(b).

III

The rationale underlying Kubrick, Wilkinson and Henderson persuades us that Gould's claim did not accrue until she first learned that O'Rourke, the primary treating physician, was a federal employee. The Supreme Court held in Kubrick that a FTCA plaintiff need not be aware of the legal significance of the facts surrounding an injury in order for a claim to accrue. Kubrick's claim, therefore, accrued when he became aware of the facts relevant to the cause and existence of his injury even though he did not realize until much later that these facts could create a malpractice cause of action. Similarly, in Wilkinson and Henderson,

the plaintiffs' causes of action accrued when they became aware or were put on inquiry notice that a government employee was involved in their injury even though they did not become aware of the legal consequences of that fact until much later. In this case, however, although Gould was probably aware soon after her husband's death that his death was caused by medical malpractice, she had no way of knowing that the principal causative actor contributing to his death was a government employee. She was, therefore, not "in possession of the critical fact [] . . . [of] who has inflicted the injury," Kubrick, 444 U.S. at 122, and, before the government informed Gould that O'Rourke was a federal employee, did not have any "knowledge to put [her] on inquiry,"

Wilkinson, 677 F.2d at 1002, or any "notice to prompt [her] to explore the legal ramifications of the government's involvement." Henderson, 785 F.2d at 126.

From the time that Mr. Gould first received medical treatment from O'Rourke at South County Family Health Care Corporation's private facility on August 30, 1980, until Mr. Gould discovered that O'Rourke was a federal employee on September 26, she simply had no indication that O'Rourke and Nathanson were United States Public Health Service employees and thus had no reason to suspect that her claim was governed by the FTCA. The physicians, working in a private health facility, were indistinguishable from other physicians on the facility's staff. She timely filed a state claim in the appropriate

Maryland forum when all information available to her indicated that such was the appropriate forum. Her later FTCA claim was filed with the Department of Health and Human Services on August 2, 1985--within two years from the time she discovered that O'Rourke was a federal employee and that she could only pursue her claim in a federal forum. To deprive her of the federal cause of action under these circumstances would be both unfair and contrary to the Supreme Court's decision in Kubrick that the FTCA limitation period begins to run only when a claimant becomes aware of the "critical facts" constituting the "cause" of an actionable injury.

In view of the above, the judgment of the district court is reversed and remanded.

REVERSED AND REMANDED.

CHAPMAN, DISSENTING:

The majority, I believe, misconstrues the clear language of 28 U.S.C. Section 2401(b), disregards decisions of this Circuit and the Supreme Court, and exceeds this Court's authority by creating a blanket exception to the limitation on the federal government's consent to be sued - rewriting, in effect, the terms and reach of the statute. The majority not only creates an exception to the language of the statute, but in the process changes the purpose of the limitation provision by formulating an open-ended rule which absolves prospective plaintiffs of their burden and obligation to exercise reasonable diligence in investigating and promptly

presenting claims. Accordingly, I dissent.

I.

In a letter dated August 8, 1983, plaintiffs' counsel, Joseph C. Ruddy, Jr., requested information from the Department of Public Health regarding the "exact work status" of Dr. O'Rourke. This inquiry was initiated more than two years and eleven months after the injury to the decedent and its cause were known by the plaintiffs. The Department of Health and Human Services ("HHS") was promptly notified of plaintiffs' request and responded to the inquiry. On September 2, 1983, a HHS attorney notified plaintiffs' counsel by telephone of Dr. O'Rourke's status as a federal employee at the time he treated

the decedent.[1] The following day, plaintiffs' counsel was advised by HHS that Dr. Nathanson was also a federal employee at the time of such treatment. Mr. Ruddy received written confirmation of Dr. O'Rourke's employment status on September 26, 1983, and similar notice of Dr. Nathanson's status on December 16, 1983.

The plaintiffs, at this time, took no action against the United States. Rather, on September 2, 1983, within hours of the expiration of the claim under Maryland's three-year statute of

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[1]In his August 8, 1983, letter, Mr. Ruddy invited the Department to respond to his request by contacting him or his staff by telephone. The notes from office telephone conversations, identified in the record as defendants' Exhibit II, show that HHS personnel attempted to contact Mr. Ruddy by telephone in response to his request as early as August 18, 1983. HHS personnel spoke with his secretary, but Mr. Ruddy was apparently on vacation and unavailable until September.

limitation, plaintiffs initiated a claim against the individual physicians before the Health Claims Arbitration Board in the State of Maryland alleging medical negligence.[2]

On December 16, 1985, the Health Claims Arbitration Board action against Drs. O'Rourke and Nathanson was dismissed upon the finding that the doctors were employed by the United States Public Health Service and the alleged wrongdoing fell within the scope

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[2]Plaintiffs erroneously state that the suit against the individual physicians was filed in "August of 1983," Appellants' Brief at 5, which was before HHS personnel informed plaintiffs' counsel that Dr. O'Rourke was a federal employee of the Public Health Service. The records of the Maryland Health Claims Arbitration Board reveal that this claim was, in fact, filed on September 2, 1983, which was the same day a HHS attorney contacted plaintiffs' counsel by telephone to notify him of Dr. O'Rourke's status as a federal employee.

of their employment. Thus, they were not subject to suit in a state court or forum pursuant to 28 U.S.C. Section 1346(b).

In early August 1985, prior to dismissal of the claim before the Health Claims Arbitration Board, an administrative tort claim was presented to the Department of Health and Human Services, Division of Public Health Service, alleging negligence by National Health Service Corps physicians in failing to expeditiously diagnose and treat G.F. Gould for Rocky Mountain Spotted Fever. This claim was denied in August 1986 on the grounds that it was barred by the statute of limitation applicable to claims prosecuted under the FTCA, 28 U.S.C. Section 2401(b).

In February, 1987, plaintiffs initiated the present action in the

United States District Court for the District of Maryland. The defendants contended that the action was barred by the two-year limitation provision of 28 U.S.C. Section 2401(b). Plaintiffs countered that since they had neither direct nor implicit knowledge of the status of the physicians as federal employees, and since the exercise of due diligence would not have revealed this fact, the statute of limitation should be tolled until plaintiffs were made aware of the fact that the physicians were federal employees and the claim was covered by the FTCA. The district court rejected this argument and found that the statutory time period set forth in Section 2401(b) had expired and therefore the court lacked jurisdiction as a matter of law.

II.

It is well established that the United States Government, as sovereign, is immune from suit unless it consents to be sued. The terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit. United States v. Sherwood, 312 U.S. 584, 586 (1941). Congress created a limited waiver of sovereign immunity in the FTCA. 28 U.S.C. Sections 2671-2680. This waiver permits suit only on terms and conditions strictly prescribed by Congress. Honda v. Clark, 386 U.S. 484, 501 (1967).

Although the FTCA gives limited consent to suits against the federal government for torts committed by its employees while acting within the scope of their official duties, the Act specifically requires an initial

presentation of a claim to the appropriate federal agency within two years of the accrual of the cause of action and a final denial by that agency as a jurisdictional prerequisite to suit under the Act. 28 U.S.C. Sections 2401(b), 2675(a); Kielvien v. United States, 540 F.2d 676, 679 (4th Cir.), cert. denied, 429 U.S. 979 (1976); West v. United States, 592 F.2d 487, 492 (8th Cir. 1979).

The applicable statute of limitation within the framework of the FTCA provides: "A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues . . . ." 28 U.S.C. Section 2401(b). This time limitation is jurisdictional and nonwaivable. Kielwien, 540 F.2d at 679.

Statutes of limitation, which "are found and approved in all systems of enlightened jurisprudence," Wood v. Carpenter, 101 U.S. 135, 139 (1879), represent a legislative determination that "even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." Order of Railroad Telegraphers v. Railway Express Agency, 321 U.S. 342, 349 (1944). While affording plaintiffs what legislatures deem reasonable time to present claims, statutes of limitation give defendants and courts a degree of protection from having to confront controversies in which the search for truth may be thwarted by the loss of evidence, whether by the death

or disappearance of witnesses, fading memories, loss of physical evidence, or the like. United States v. Marion, 404 U.S. 307, 322 n. 14 (1971); Burnett v. New York Central Railroad Co., 380 U.S. 424 428 (1965).

Section 2401(b) represents a deliberate balance struck by Congress whereby a limited waiver of sovereign immunity is conditioned upon the prompt presentation of tort claims against the government. The Supreme Court, in recognizing this balance, has instructed the judiciary to abstain from extending or narrowing Section 2401(b) beyond that which Congress intended and thereby defeating its obvious purpose. United States v. Kubrick, 444 U.S. 111, 117 (1979).

Applying these principles, federal courts with few exceptions have

dismissed complaints where a plaintiff failed to file a claim with the appropriate federal agency within the two year limitations period, even in cases where the plaintiffs' failure to submit a claim in a timely manner was the result of the plaintiff's ignorance of the defendant's status as a federal employee. Flickinger v. United States, 523 F. Supp. 1372, 1375 (W.D. Pa. 1981). Courts have held that despite the harsh impact of this rule on plaintiffs, Wilkinson v. United States, 677 F.2d 998, 1001 (4th Cir.), cert. denied, 459 U.S. 906 (1982), and "strong equitable considerations notwithstanding, the two-year limitation period of 28 U.S.C. Section 2401(b) cannot be tolled or waived." Lien v. Beehner, 453 F. Supp. 604, 606 (N.D.N.Y. 1978) See also United Missouri Bank South v. United States,

423 F. Supp. 571, 577 (W.D. Mo. 1976) (limitation provision of FTCA not to be extended by implication or by equitable considerations).

Although FTCA liability is determined "in accordance with the law of the place where the act or omission occurred," 28 U.S.C. Section 1346(b), federal law determines when a claim accrues. Stoleson v. United States, 629 F.2d 1265, 1268 (7th Cir. 1980); Portis v. United States, 483 F.2d 670, 672 n.4 (4th Cir. 1973); Sexton v. United States, 832 F.2d 629, 633 n.4 (D.C. Cir. 1987); Wehrman v. United States, 830 F.2d 1480, 1482-1483 (8th Cir. 1987). In Kubrick v. United States, 444 U.S. 111 (1979), the Supreme Court reiterated that the general rule under the FTCA "has been that a tort claim accrues at the time of the plaintiff's injury,"

although in medical malpractice cases it is thought to extend "until the plaintiff has discovered both his injury and its cause." Id. at 120.

The clear import of Kubrick is that a claim accrues within the meaning of Section 2401(b) when the plaintiff knows or, in the exercise of due diligence, should have known both the existence and the cause of his injury. "This decision signifies a retreat from the expansive view of 'accrual' previously adopted by a number of the circuits, including the Fourth Circuit." Dessi v. United States, 489 F. Supp. 722, 724 (E.D.Va. 1980). Under Kubrick, the court concluded in Dessi,

> nothing more than knowledge of injury and causation is required for the cause of action to accrue. The action accrues even if the claimant believes that his injury was unavoidable and did not

> indicate negligent treatment. It is the plaintiff's burden, once he knows of his injury and its cause, to determine within the limitations period whether or not to file suit.

Id. at 725. See also Gilbert v. United States, 720 F.2d 372, 374 (4th Cir. 1983) ("The Supreme Court has determined that a cause of action accrues within the meaning of [28 U.S.C.] Section 2401(b) when a prospective plaintiff knows of both the existence of his injury and its cause."); Dearing v. United States, 835 F.2d 226, 228 (9th Cir. 1987) ("A medical malpractice claim does not accrue under the FTCA until the plaintiff discovers, or reasonably should have discovered, his injury and its causes."); Wehrman, 830 F.2d at 1483 (same).

The question presented by this case is when did the plaintiffs' claim "accrue" within the meaning of the FTCA?

Did the cause of action accrue when plaintiffs learned both of the existence and cause of the decedent's injury, or did it only accrue when plaintiffs also learned the legal identity of the alleged tort-feasors as federal employees. I believe plaintiffs' claim accrued, in accordance with Kubrick, on September 4, 1980, upon the death of Gary Francis Gould. Plaintiffs at this time were aware of the existence of the injury and its cause, including the identity and conduct of attending physicians. This sufficiently armed plaintiffs with the "critical facts" to investigate the claim and present it within the two-year statute of limitation.

The plaintiffs argue that in addition to knowledge of the injury and its cause Kubrick implies that a claim

does not accrue until a plaintiff learns the legal identity of the alleged tort-feasor as a federal employee.[3] The statute of limitation should be tolled, plaintiffs continue, when pertinent information such as knowledge of the injury or the legal identity of the tort-feasor are in the control of the putative defendant, unavailable to the plaintiff or at least difficult to obtain. This is the rule the majority

[3]The suggestion is made by the majority, as well as the plaintiffs, that the term "cause" means both the cause of the injury from a medical point of view and the legal identity of the alleged tort-feasors. Such a reading of the word "cause" in this context, I believe, is not to be found in our legal precedents. Quoting Dyniewicz v. United States, 742 F.2d 484, 486 (9th Cir. 1984), the Third Circuit rejected this broad interpretation of "cause": "Discovery of the cause of one's injury, however, does not mean knowing who is responsible for it. The 'cause' is known when the immediate physical cause of the injury is discovered." Zeleznik v. United States, 770 F.2d 20, 23 (3rd Cir. 1985).

adopts. Significantly, the legal identity of the tort-feasor was presumed in Kubrick. Nowhere in Kubrick do I find any reference to the legal identity of the tort-feasor.

This rule has been considered and rejected in this Circuit. In Baker v. United States, 341 F. Supp. 494 (D.Md. 1972), aff'd per curiam, No. 72-1708 (4th Cir. Nov. 30, 1972), it was held that an automobile negligence action filed in state court within the three-year Maryland limitation period but more than two years after the accident was forever barred pursuant to 28 U.S.C. Section 2401(b). A defendant driver, who was acting within the scope of his government employment at the time of the accident, initially handled the claim through his insurance company and his own attorney. Some five years after

the accident the defendant brought the claim to the attention of government officials, after which the government promptly removed the claim to federal court where the United States was substituted as the party defendant. The plaintiff did not discover until after the statute of limitation had run that the driver who allegedly caused the accident was a federal employee acting within the scope of his employment.[4] "All cases cited or found," the district court concluded, "have held that the [FTCA] two-year limitation period applies, and that such suits cannot be remanded to the state court to proceed

[4]As in the case at bar, the plaintiff was unaware that the defendant driver was a federal employee, neither was there evidence apparent to others involved in the accident to put them on notice that the defendant was a federal employee acting within the scope of his employment.

against the government employee individually." Baker, 341 F. Supp. at 495-496 (citations omitted). The court further stated:

> That result in the instant case seems unfair, since no one realized until too late that Smith was in the course of his employment by the government at the time of the accident. However, no facts which would ordinarily amount to an estoppel against Smith, his insurer or the government have been shown. Other courts have applied the statute strictly against plaintiffs in circumstances which seem to me more favorable to the plaintiff than those in the cases at bar. See, e.g., Mann v. United States, [339 F.2d 672 (9th Cir. 1968)]. If this case is appealed, I would be happy to be reversed. But under the statute and the authorities, I must dismiss the suits.

Id. at 496. We affirmed this judgment of the district court.

In Wilkinson v. United States, 677 F.2d 998 (4th Cir.), cert. denied, 459

U.S. 906 (1982), a rented car driven by a sailor on business for the Navy collided with the plaintiff's automobile. At the time of the collision, the plaintiff knew that the other driver was employed by the Navy. There was no indication, however, that the plaintiff was aware that the driver was actually on government business. We rejected the plaintiff's assertion that the cause of action did not accrue until he learned that the sailor was acting within the scope of his employment at the time of the accident and thus covered by the FTCA. Id. at 1000. Speaking for the majority, Judge Murnaghan emphasized that the government employee and government officials responded to the plaintiff's claim in a reasonable, timely and fair manner. Moreover, attorneys for the government

in Wilkinson, like those in the case before us, "were not shown to have known that the accident had even occurred until a date more than two years after the accrual of the claim. . . .. No less established is the fact that the Government has not behaved in any unfair way, and that, as between it and [plaintiff], the latter, or, more realistically, his counsel, brought about the consequences resulting from counsel's inaction." Id. at 1000-1001. The same observations, it seems, could be made in the case at bar.[5]

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[5]The plaintiff in Wilkinson arguably presented a more appealing case than the one before us today in that the case was initiated in a state court prior to expiration of the FTCA statute of limitation. Once the plaintiff was aware of the legal significance of the defendant driver's status as a federal employee, plaintiff sought to remove the suit to federal court. Nevertheless, we barred the federal action because it was

Judge Butzner, in dissent, proposed the rule that plaintiff's "claim accrued within the meaning of Section 2401(b) in the context of the Drivers' Act ([28 U.S.C. Section 2679 (b)-(e)] when he or his attorney knew, or in the exercise of reasonable care should have known, that his injury was caused by a government employee acting within the scope of his employment." Id. at 1004 (Butzner, J., dissenting).

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filed in federal court shortly after the FTCA statute had run.

Plaintiffs in the case at bar, however, apparently made no attempt to investigate or file their claim until two years and eleven months after plaintiffs knew of the injury and its cause. Plaintiffs did not file an administrative claim with the HHS until nearly five years after Mr. Gould's death and nearly two years after receiving confirmation of the attending physicians' work status. It was six and a half years after the injury before suit was initiated in federal court. Such delays by the plaintiffs surely put defendants at a disadvantage in defending the suit against them.

In Henderson v. United States, 785 F.2d 121 (4th Cir. 1986), a substitute U.S. mail carrier collided with the plaintiff's automobile. Although the plaintiff had reason to know that the vehicle which struck her may have been a government vehicle, she argued that her cause of action did not accrue until she ascertained that the driver was a federal employee. In rejecting the argument, we held that there was sufficient information available to the plaintiff to put her on notice that the other driver was an agent of the federal government.

The rule the majority creates today would establish an exception that would change all precedents as to when a medical malpractice action accrues, and would be against the clear admonition in Kubrick that courts should carefully

construe the statute of limitation for the FTCA so as not to extend the limited waiver of sovereign immunity beyond that which Congress intended. Id. at 117-118. The holding of the majority would greatly expand the rule that was unsuccessfully proposed by the dissent in Wilkinson, because the majority places no burden upon a plaintiff or a plaintiff's attorney to exercise reasonable care, to investigate or to take any action to determine the employment status of an alleged tort-feasor. The majority excuses such inaction by prospective plaintiffs and their attorneys with its holding "the rationale underlying Kubrick, Wilkinson and Henderson persuades us that Gould's claim did not accrue until she first learned that O'Rourke, the primary

treating physician, was a federal employee."

Such a holding ignores the well established rule that once a prospective plaintiff learns of his injury, he is on notice that there may have been an invasion of his legal rights and that he should investigate whether another may be liable to him. Zeleznik v. United States, 770 F.2d 20, 22 (3rd Cir. 1985), cert. denied, 475 U.S. 1108 (1986).

While Wilkinson and Henderson, unlike Baker, arguably differ from the present controversy in that there was no indication that the defendants in the case sub judice were federal employees, Wilkinson and Henderson indicate that plaintiffs have an affirmative duty to inquire as to the legal identity of the defendant. There is no evidence that Mrs. Gould sought to ascertain or was

denied access to information concerning the employment status of the treating physicians prior to the expiration of the limitation period. Neither is there evidence that the treating physicians "held themselves out as agents and employees of the private health facility" so as to mislead or deceive the plaintiffs or otherwise hide their legal identity as federal employees. Kubrick, Baker, Wilkinson and Henderson, I believe, stand for the proposition that a cause of action accrues once the existence of an injury and its cause are known, and the statute of limitation under the FTCA will not be tolled until a plaintiff learns that an alleged tort-feasor is a federal employee.

The Second Circuit held in Kelley v. United States, 568 F.2d 259, 262 (2d Cir.), cert. denied, 439 U.S. 830

(1978), that when the government intentionally delays in order to invoke the statute of limitation, the statute is tolled.[6] In the case at bar, however, there is no evidence that the government stalled the discovery process or otherwise blocked plaintiffs from obtaining information within the limitation period. Indeed, the evidence

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[6]Several courts have held in automobile accident cases involving federal employees that the strict two-year statute of limitation should not bar claims in federal courts when a state court action or an administrative claim was initiated before the two-year period expired, thereby giving the government notice of such a claim within the limitation period. See, e.g., McGowan v. Williams, 623 F.2d 1239 (7th Cir. 1980); Chambly v. Lindy, 601 F. Supp. 959 (N.D. Ind. 1985); Harris v. Burris Chemical, 490 F. Supp. 968 (N.D. Ga. 1980). Such exceptions are not universally recognized in the federal courts. Moreover, an exception of this nature would not apply in this case since the plaintiffs did not initiate their first action until more than two years after the death of Mr. Gould.

is to the contrary. While it is true that the employment status of the attending physicians was not made known to plaintiffs at the time treatment was given, it is also true that plaintiffs made no inquiry as to the physicians' employment status until August 1983. When asked, the government responded promptly to plaintiffs' request for this information. Unfortunately, such requests were not made until the statute of limitation had expired. The district court, I believe, correctly observed: "With the death and its cause discovered on September 4, 1980, due diligence is not present when an initial inquiry about who employed the tort-feasors is made 35 months later and then instituting the administrative tort claim two years after the inquiry."

The facts indicate that plaintiffs failed to exercise due diligence. Indeed, there is nothing in the record to suggest that prior to August 1983 plaintiffs' counsel made any effort to investigate the legally significant facts which plaintiffs contend would have been undiscoverable even if due diligence had been exercised. This argument, it seems, impliedly concedes that plaintiffs failed to exercise due diligence in investigating the elements of their claim. Plaintiffs have failed, in my estimation, to meet their burden and duty of exercising due diligence.

The government is under no obligation to notify every prospective plaintiff of its identity and involvement through its employees in all potential legal actions. Van Lieu v. United States, 542 F. Supp. 862, 866

(N.D. N.Y. 1982). The burden is on the plaintiff to discover the employment status of the tort-feasor and to bring suit within the applicable limitation period. See Dessi, 489 F. Supp. at 725 ("It is the plaintiff's burden, once he knows of his injury and its cause, to determine within the limitations period whether or not to file suit."); Zeleznik, 770 F.2d at 23 (once a party learns of his injury he is put on notice of a potential claim and "the burden is upon him to determine within the limitations period whether any party may be liable to him").

It will not suffice for plaintiffs to assert baldly that "even due diligence would not have discovered the fact that the physicians" were federal employees. The burden is on plaintiffs to show that due diligence was exercised

and that critical information, reasonable investigation notwithstanding, was undiscoverable.[7]

[7]In oral argument, plaintiffs' counsel excused plaintiffs' failure to exercise due diligence prior to August 1983 by suggesting that Mrs. Gould was reluctant to relive this tragic episode through litigation, and it was not until the Spring or Summer of 1983 that Mrs. Gould felt sufficiently fortified to press forward with her claim. While one is sympathetic to her plight, this is not a legally recognized justification for sleeping on one's claim. As the court acknowledged in Sexton v. United States, 832 F.2d 629, 636 (D.C. Cir. 1987): [A]ny statute of limitations that puts inquiry burdens on a plaintiff, as this one clearly does, see Kubrick, 444 U.S. at 123 & n. 10, 100 S.Ct. at 360 n.10, entails a degree of ghoulish behavior. Patients or survivors, whose instinct may well be to shut off from their minds the grim experience through which they have passed, are required instead to follow up on their leads. For persons of any sensitivity this must be a difficult or even repugnant process. Yet, to protect defendants from stale claims, legislatures put potential plaintiffs to the hard choice of proceeding with such inquiries or risking loss of possible claims.

No evidence was offered to support the assertion that "critical facts" were undiscoverable. Indeed, the government's prompt response to plaintiffs' request for information contradicts this contention. No impediment, other than plaintiffs' inaction, shielded the physicians' legal identity. In summary, there is neither allegation nor evidence that the government delayed, mislead or otherwise obstructed plaintiffs in determining the attending physicians' employment status.

Plaintiffs' construction of the limitation statute, adopted by the majority, would obviate the necessity of due diligence, even when the injury and its cause are known and a minimum inquiry would have led plaintiffs to discover in a timely manner the employment status of the treating

physicians. The majority removes incentives for the timely investigation and prompt presentation of claims. The blanket exception to Section 2401(b), which the majority creates, enables a plaintiff to maintain a FTCA action against the government years after plaintiff's injury and its cause are well known if, for any reason, it escaped the plaintiff's injury and its cause are well known if, for any reason, it escaped the plaintiff's attention -- even absent reasonable investigation -- that the alleged tort-feasor was a government agent acting within the scope of his employment. This open-ended rule vitiates the very purpose of the statute of limitation.

The plaintiffs further contend that their claim should not be barred by the statute of limitation because they were

"blamelessly ignorant" of the federal government's involvement, and such involvement could not have been presumed, implied or discovered, even after exercise of due diligence. The Eighth Circuit, in Wollman v. Gross, 637 F.2d 544, 548-49 (8th Cir. 1980), cert. denied, 454 U.S. 893 (1981), rejected the suggestion that the doctrine of "blameless ignorance" extends the date of "accrual" until the moment when the plaintiff becomes aware of the defendant's status as a federal employee. The purpose of the statute of limitation is to require the reasonably diligent presentation of tort claims. This may require a plaintiff to obtain legal counsel promptly and together with counsel discover the critical facts and all of their possible legal ramifications so as to enable the

plaintiff to bring suit within a reasonable time. Id. at 549. As stated by the Supreme Court in Kubrick:

> A plaintiff such as Kubrick, armed with the facts about the harm done to him, can protect himself by seeking advice in the medical and legal community. To excuse him from promptly doing so by postponing the accrual of his claim would undermine the purpose of the limitations statute, which is to require the reasonably diligent presentation of tort claims against the Government.

Kubrick, 444 U.S. at 123. See Id. at 128 (Stevens, J., dissenting) ("A plaintiff who remains ignorant through lack of diligence cannot be characterized as 'blameless.'"); Sexton, 832 F.2d at 633.

When the facts of a case become so grave as to alert a reasonable person that there may have been negligence in a patient's treatment, the statute of

limitation begins to run against the Claimant's cause of action. See West, 592 F.2d at 492-93, quoting Hulver v. United States, 562 F.2d 1132, 1134 (8th Cir. 1977), cert. denied, 435 U.S. 951 (1978). In the case at bar the plaintiff was immediately aware of the failure to properly diagnose and treat and she knew that Drs. O'Rourke and Nathanson were the decedent's attending physicians. With this information of the physicians' errors followed by the patient's death, a reasonable person would have been alerted at the time of the death that such death may have been the result of medical negligence.

I am not unmindful that a strict adherence to the requirements of the statute of limitation provision under the FTCA often works a substantial hardship on plaintiffs and may have a

harsh impact on a party innocent of any impropriety. Statutes of limitation often make it impossible to enforce what are otherwise valid claims. Although I recognize the hardship resulting to the plaintiffs in this case, I believe we have no choice but to apply the law as written. To accept plaintiffs' arguments would be rewriting the FTCA to allow broad, open-ended exceptions to Sections 2675(a) and 2401(b). Flickinger, 523 F. Supp. at 1376-77. "Although exceptions to the applicability of the limitations period might occasionally be desirable, we are not free to enlarge that consent to be sued which the Government, through Congress, has undertaken so carefully to limit." Mann v. United States, 399 F.2d 672, 673 (9th Cir. 1968). See also Wolman, 637 F.2d at 549. As the Supreme

Court has instructed, it is clearly the prerogative of Congress, not that of the judiciary, to reform the terms and scope of waiver of sovereign immunity beyond that which Congress intended. Kubrick, 444 U.S. at 117-19.

"It goes without saying," as the Kubrick Court observed, "that statutes of limitations often make it impossible to enforce what were otherwise perfectly valid claims." Kubrick, 444 U.S. at 125. Yet, they serve important, well-established purposes affirmed throughout our jurisprudence. We are bound to give them effect until such time as the creator of such provisions, the legislative branch, exercises its prerogative to amend the statute.

III.

I believe the rule the majority articulates creates a perverse incentive

for prospective plaintiffs to avoid the reasonable investigation and prompt presentation of medical malpractice claims involving federal employees, even after knowledge of an injury and its cause should have put a plaintiff on notice of an invasion of his legal rights. I cannot agree that the result reached by the majority today accords with the clear language of the statute or with congressional intent embodied in the FTCA or with the precedents of this Court of the Supreme Court. I respectfully dissent.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-3091

REGIS ANN GOULD, as Parent Guardian and next of friend of Aaron Russell Could and Adrienne Marie Gould, Regis Ann Gould, as Special Administrator of the Estate of Gary Francis Gould; REGIS ANN GOULD

Plaintiffs - Appellants,

v.

U. S. DEPARTMENT OF HEALTH & HUMAN SERVICES; PUBLIC HEALTH SERVICE

Defendants - Appellees.

On Petition for Rehearing with Suggestion for Rehearing in Banc

The appellees' petition for rehearing and suggestion for rehearing in banc were submitted to the Court. A majority of judges having voted in a requested poll of the Court to grant rehearing in banc,

IT IS ORDERED that the rehearing in banc is granted.

IT IS FURTHER ORDERED that this case shall be calendared for argument at the February 1990 session of Court. Within ten days of the date of this order five additional copies of appellant's briefs and five additional copies of appellees briefs shall be filed and appellees will file nine additional copies of the joint appendix.

For the Court,

JOHN M. GREACEN
Clerk

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-3091

REGIS ANN GOULD, as Parent Guardian and next of friend of Aaron Russell Gould and Adrienne Marie Gould, Regis Ann Gould, as Special Administrator of the Estate of Gary Francis Gould; REGIS ANN GOULD,

Plaintiffs - Appellants,

versus

U. S. DEPARTMENT OF HEALTH & HUMAN SERVICES; PUBLIC HEALTH SERVICE,

Defendants - Appellees.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Joseph C. Howard, District Judge. (CA-87-473JH)

Argued: February 5, 1990

Decided: June 8, 1990

Before ERVIN, Chief Judge, and RUSSELL, WIDENER, HALL, PHILLIPS, MURNAGHAN, SPROUSE, CHAPMAN, WILKINSON, and WILKINS, Circuit Judges, sitting en banc.

Affirmed by published opinion. Judge Chapman wrote the majority opinion, in which Chief Judge Ervin and Judges Russell, Widener, Hall, Phillips, Murnaghan, Wilkinson, and Wilkins concurred. Judge Sprouse wrote a dissenting opinion.

ARGUED: Joseph Cornelius Ruddy, Jr., Hyattsville, Maryland, for Appellants. Lowell V. Sturgill, Jr., UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellees. **ON BRIEF:** Breckinridge L. Willcox, United States Attorney, Juliet A. Eurich, Assistant United States Attorney, Baltimore, Maryland; Sally K. Trebbe, Office of the General Counsel, DEPARTMENT OF HEALTH AND HUMAN SERVICES, Washington, D.C., for Appellees.

CHAPMAN, Circuit Judge:

Regis Ann Gould filed this action individually, and in the dual capacity as special administrator of the estate of her late husband, Gary Francis Gould,

and as a parent guardian and next friend of her minor children, Aaron Russell Gould and Adrienne Marie Gould, seeking damages for the alleged wrongful death of Gary Francis Gould resulting from alleged medical malpractice. The district court granted the defendants' motion for summary judgment and found that the claim was time barred under 28 U.S.C. Section 2401(b). Appellant asserts that her claim was timely because such claim did not accrue until she learned that one of the treating physicians was a federal employee. We find that the cause of action accrued when the plaintiffs learned of both the existence and the cause of the decedent's injury, and we affirm.

I

August 27, 1980, the decedent, Gary Francis Gould, began experiencing headache, fever, nausea, stiff neck, and other symptoms of illness. These conditions persisted and on the morning of August 30, 1980 he went to the South County Family Health Care Corporation, in Anne Arundel County, Maryland, and was treated by James Kevin O'Rourke, M.D., a commissioned officer of the United States Public Health Service assigned to the National Health Service Corps and working at the health center. The Commissioned Corp of the Public Health Service is established and administered pursuant to the Public Health Service Act, 42 U.S.C. Sections 204 et seq. The National Health Service Corp is established pursuant to 42 U.S.C. Section 254(d). The purpose

of the Corps is to provide health care providers in areas designated as health manpower shortage areas, and the Public Health Service is an agency in the Department of Health and Human Services.

After being treated by Dr. O'Rourke, Mr. Gould returned home, but his condition deteriorated. He called Dr. O'Rourke again, and on the afternoon of August 30, 1980, he was admitted to the Anne Arundel General Hospital where Dr. Barry R. Nathanson, M.D., a civilian employee of the United States Public Health Service in the National Health Service Corps, consulted with Dr. O'Rourke about Mr. Gould's condition. Each of these doctors was a federal employee assigned to the South County Family Health Care Corporation in a health manpower shortage area.

Numerous tests were performed with negative results and it was thought that the symptoms were from a viral syndrome. However, when a rash developed on September 3, Dr. O'Rourke suspected Rocky Mountain Spotted Fever, and a consultation with an infectious disease specialist confirmed this diagnosis. Antibiotic therapy was immediately begun, but Mr. Gould died at the hospital on September 4, 1980. During the course of treatment, particularly prior to the diagnosis of Rocky Mountain Spotted Fever, members of the Gould family complained about the deterioration of Gould's condition and were advised that the condition was a virus.

In a letter of August 8, 1983, plaintiffs' counsel requested information from the Department of Public Health regarding the "exact work

status" of Dr. O'Rourke. The Department of Health and Human Services (HHS) was promptly notified of this request and responded to the inquiry. On September 2, 1983, a HHS attorney notified plaintiffs' attorney by telephone of Dr. O'Rourke's status as a federal employee at the time he treated the decedent.[1] The following day, plaintiffs' counsel was advised by HHS that Dr. Nathanson was also a federal employee at the time of such treatment. Plaintiffs' attorney received written confirmation of Dr.

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[1]In his August 8, 1983, letter, plaintiffs' attorney invited the Department to respond to his request by contacting him or his staff by telephone. The notes from office telephone conversations, identified in the record as defendants' exhibit 11, show that HHS personnel attempted to contact the attorney by telephone as early as August 18, 1983. HHS personnel spoke with the attorney's secretary, but the attorney was apparently on vacation and unavailable until September.

O'Rourke's employment status on September 26, 1983, and a similar notice of Dr. Nathanson's status on December 16, 1983.

The plaintiffs took no action against the United States at this time, but on September 2, 1983, within hours of the expiration of the claim under Maryland's three year statute of limitations, plaintiffs initiated a claim against the individual physicians before the Health Claims Arbitration Board alleging negligent care and treatment of the decedent. On December 16, 1985, action before the Health Claims Arbitration Board's action was dismissed upon a finding that the doctors were employed by the United States Public Health Service, and the alleged wrongdoing fell within the scope of their employment, and they were not

subject to suit in a state court or forum pursuant to 28 U.S.C. Section 1346(b).

In early August 1985, prior to dismissal of the claim before the Health Claims Arbitration Board, an administrative tort claim was presented to the Department of Health and Human Services, Division of Public Health Service, alleging negligence by National Health Service Corps physicians in failing to expeditiously diagnose and treat Gary F. Gould for Rocky Mountain Spotted Fever. This claim was denied in August 1986 on the ground that it was barred by the statute of limitations applicable to claims prosecuted under the Federal Tort Claims Act, 28 U.S.C. Section 2401(b).

In February 1987, plaintiffs initiated the present action in the

United States District Court for the District of Maryland. The defendants raised the bar of the two-year limitation provision contained in 28 U.S.C. Section 2401(b). Plaintiffs countered that she had neither direct nor implicit knowledge of the status of the physicians as federal employees, and that the statute of limitations should be tolled until plaintiffs was made aware of the fact that the physicians were federal employees, because the exercise of due diligence would not have revealed this fact. The district court rejected this argument and found that the statutory period had expired, and that the court lacked jurisdiction as a matter of law. We agree and affirm.

II.

It is well established that the United States Government, as sovereign,

is immune from suit unless it consents to be sued. The terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit. United States v. Sherwood, 312 U.S. 584, 586 (1941). Congress created a limited waiver of sovereign immunity in the FTCA. 28 U.S.C. Sections 2671-2680. This waiver permits suit only on terms and conditions strictly prescribed by Congress. Honda v. Clark, 386 U.S. 484, 501 (1967).

Although the FTCA gives limited consent to suits against the federal government for torts committed by its employees while acting within the scope of their official duties, the Act specifically requires an initial presentation of a claim to the appropriate federal agency within two years of the accrual of the cause of

action and a final denial by that agency as a jurisdictional prerequisite to suit under the Act. 28 U.S.C. Sections 2401(b), 2675(a); Kielwien v. United States, 540 F.2d 676, 679 (4th Cir.), cert. denied, 429 U.S. 979 (1976); West v. United States, 592 F.2d 487, 492 (8th Cir. 1979).

The applicable statute of limitation within the framework of the FTCA provides: "A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues . . ." 28 U.S.C. Section 2401(b). This time limitation is jurisdictional and nonwaivable. Kielwien, 540 F.2d at 679.

Statutes of limitation, which "are found and approved in all systems of enlightened jurisprudence," Wood v.

Carpenter, 101 U.S. 135, 139 (1879), represent a legislative determination that "even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." Order of Railroad Telegraphers v. Railway Express Agency, 321 U.S. 342, 349 (1944). While affording plaintiffs what legislatures deem reasonable time to present claims, statutes of limitation give defendants and courts a degree of protection from having to confront controversies in which the search for truth may be thwarted by the loss of evidence, whether by the death or disappearance of witnesses, fading memories, loss of physical evidence, or the like. United States v. Marion, 404

U.S. 307, 322 n.14 (1971); Burnett v. New York Central Railroad Co., 380 U.S. 424, 428 (1965).

Section 2401(b) represents a deliberate balance struck by Congress whereby a limited waiver of sovereign immunity is conditioned upon the prompt presentation of tort claims against the government. The Supreme Court, in recognizing this balance, has instructed the judiciary to abstain from extending or narrowing Section 2401(b) beyond that which Congress intended and thereby defeating its obvious purpose. United States v. Kubrick, 444 U.S. 111, 117 (1979).

Applying these principles, federal courts with few exceptions have dismissed complaints where a plaintiff failed to file a claim with the appropriate federal agency within the

two-year limitations period, even in cases where the plaintiff's failure to submit a claim in a timely manner was the result of the plaintiff's ignorance of the defendant's status as a federal employee. Flickinger v. United States, 523 F. Supp. 1372, 1375 (W.D. Pa. 1981). Courts have held that despite the harsh impact of this rule on plaintiffs, Wilkinson v. United States, 677 F.2d 998, 1001 (4th Cir.), cert. denied, 459 U.S. 906 (1982), and "strong equitable considerations notwithstanding, the two-year limitation period of 28 U.S.C. Section 2401(b) cannot be tolled or waived." Lien v. Beehner, 453 F. Supp. 604, 606 (N.D.N.Y. 1978) See also United Missouri Bank South v. United States, 423 F. Supp. 571, 577 (W.D. Mo. 1976) (limitation provision of FTCA not

to be extended by implication or by equitable considerations).

Although FTCA liability is determined "in accordance with the law of the place where the act or omission occurred," 28 U.S.C. Section 1346(b), federal law determines when a claim accrues. Stoleson v. United States, 629 F.2d 1265, 1268 (7th Cir. 1980); Portis v. United States, 483 F.2d 670, 672 n.4 (4th Cir. 1973); Sexton v. United States, 832 F.2d 629, 633 n.4 (D.C. Cir. 1987); Wahrman v. United States, 830 F.2d 1480, 1482-1483 (8th Cir. 1987). In Kubrick v. United States, 444 U.S. 111 (1979), the Supreme Court reiterated that the general rule under the FTCA "has been that a tort claim accrues at the time of the plaintiff's injury, "although in medical malpractice cases it is thought to extend "until the

plaintiff has discovered both his injury and its cause." Id. at 120.

The clear import of Kubrick is that a claim accrues within the meaning of 2401(b) when the plaintiff knows or, in the exercise of due diligence, should have known both the existence and the cause of his injury. "This decision signifies a retreat from the expansive view of 'accrual' previously adopted by a number of the circuits, including the Fourth Circuit." Dassi v. United States, 489 F. Supp. 722, 724 (E.D. Va. 1980). Under Kubrick, the court concluded in Dassi,

> nothing more than knowledge of injury and causation is required for the cause of action to accrue. The action accrues even if the claimant believes that his injury was unavoidable and did not indicate negligent treatment. It is the plaintiff's burden once he knows of his injury and its cause, to determine

within the limitations period whether or not to file suit.

Id. at 725. See also Gilbert v. United States, 720 F.2d 372, 374 (4th Cir. 1983) ("The Supreme Court has determined that a cause of action accrues within the meaning of [28 U.S.C.] Section 2401(b) when a prospective plaintiff knows of both the existence of his injury and its cause."); Dearing v. United States, 835 F.2d 226, 228 (9th Cir. 1987) ("A medical malpractice claim does not accrue under the FTCA until the plaintiff discovers, or reasonably should have discovered, his injury and its causes."); Wehrman, 830 F.2d at 1483 (same).

The question presented by this case is when did the plaintiffs' claim "accrue" within the meaning of the FTCA? Did the cause of action accrue when plaintiffs learned both of the existence

and cause of the decedent's injury, or did it only accrue when plaintiffs also learned the legal identity of the alleged tort-feasors as federal employees? We hold that plaintiffs' claim accrued, in accordance with Kubrick, on September 4, 1980, upon the death of Gary Francis Gould. Plaintiffs at this time were aware of the existence of the injury and its cause, including the identity and conduct of attending physicians. This sufficiently armed plaintiffs with the "critical facts" to investigate the claim and present it within the two-year statute of limitations.

The plaintiffs argue that in addition to knowledge of the injury and its cause, Kubrick implies that a claim does not accrue until a plaintiff learns the legal identity of the alleged tort-

feasor as a federal employee.[2] The statute of limitations should be tolled, plaintiffs continue, when pertinent information such as knowledge of the injury or the legal identity of the tort-feasor is in the control of the putative defendant, unavailable to the plaintiff or at least difficult to obtain. Significantly, the legal identity of the tort-feasor was presumed in Kubrick. Nowhere in Kubrick is any

[2]The suggestion is made by plaintiffs that the term "cause" means both the cause of the injury from a medical point of view and the legal identity of the alleged tort-feasors. Such a reading of the word "cause," in this context, is not to be found in our legal precedence. Quoting Dyniewicz v. United States, 742 F.2d 484, 486 (9th Cir. 1984), Third Circuit rejected this broad interpretation of "cause"; "discovery of the cause of one's injury, however, does not mean knowing who is responsible for it. The 'cause' is known when the immediate physical cause of the injury is discovered." Zeleznik v. United States, 77 F.2d 20, 23 (3rd Cir. 1985).

reference to the legal identity of the tort-feasor.

This rule has been considered and rejected in this Circuit. In Baker v. United States, 341 F. Supp. 494 (D. Md. 1972), aff'd per curiam, No. 72-1708 (4th Cir. Nov. 30, 1972), it was held that an automobile negligence action filed in state court within the three-year Maryland limitation period but more than two years after the accident was forever barred pursuant to 28 U.S.C. Section 2401(b). A defendant driver, who was acting within the scope of his government employment at the time of the accident, initially handled the claim through his insurance company and his own attorney. Some five years after the accident the defendant brought the claim to the attention of government officials, after which the government

promptly removed the claim to federal court where the United States was substituted as the party defendant. The plaintiff did not discover until after the statute of limitations had run that the driver who allegedly caused the accident was a federal employee acting within the scope of his employment.[3] "All cases cited or found," the district court concluded, "have held that the [FTCA] two-year limitation period applies, and that such suits cannot be remanded to the state court to proceed against the government employee individually." Baker, 341 F. Supp. at

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[3]As in the case at bar, the plaintiff was unaware that the defendant driver was a federal employee, neither was there evidence apparent to others involved in the accident to put them on notice that the defendant was a federal employee acting within the scope of his employment.

495-496 (citations omitted). The court further stated:

> That result in the instant case seems unfair, since no one realized until too late that Smith was in the course of his employment by the government at the time of the accident. However, no facts which ordinarily amount to an estoppel against Smith, his insurer or the government have been shown. Other courts have applied the statute strictly against plaintiffs in circumstances which seem to me more favorable to the plaintiff than those in the cases at bar. See, e.g., Mann v. United States, [399 F.2d 672 (9th Cir. 1968)]. If this case is appealed, I would be happy to be reversed. But under the statute and the authorities, I must dismiss the suits.

Id. at 496. We affirmed this judgment of the district court.

In Wilkinson v. United States, 677 F.2d 998 (4th Cir.), cert. denied, 459 U.S. 906 (1982), a rental car driven by a sailor on business for the Navy

collided with the plaintiff's automobile. At the time of the collision, the plaintiff knew that the other driver was employed by the Navy. There was no indication, however, that the plaintiff was aware that the driver was actually on government business. We rejected the plaintiff's assertion that the cause of action did not accrue until he learned that the sailor was acting within the scope of his employment at the time of the accident and thus was covered by the FTCA. Id. at 1000. Speaking for the majority, Judge Murnaghan emphasized that the government employee and government officials responded to the plaintiff's claim in a reasonable, timely and fair manner. Moreover, attorneys for the government in Wilkinson, like those in the case before us, "were not shown to have known

that the accident had even occurred until a date more than two years after the accrual of the claim. . . .. No less established is the fact that the Government has not behaved in any unfair way, and that, as between it and [plaintiff], the latter, or, more realistically, his counsel, brought about the consequences resulting from counsel's inaction." Id. at 1000-01. The same observations, it seems, could be made in the case at bar.[4]

[4]The plaintiff in Wilkinson arguably presented a more appealing case than the one before us today in that the case was initiated in a state court prior to expiration of the FTCA statute of limitations. Once the plaintiff was aware of the legal significance of the defendant driver's status as a federal employee, plaintiff sought to remove the suit to federal court. Nevertheless, we barred the federal action because it was filed in federal court shortly after the FTCA statute had run. Plaintiffs in the case at bar, however, apparently made no attempt to investigate or file their claim until two years and eleven months

In Henderson v. United States, 785 F.2d 121 (4th Cir. 1986), a substitute United States mail carrier collided with the plaintiff's automobile. Although the plaintiff had reason to know that the vehicle which struck her may have been a government vehicle, she argued that her cause of action did not accrue until she ascertained that the driver was a federal employee. In rejecting the argument, we held there was sufficient information available to the plaintiff to put her on notice that the

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after plaintiffs knew of the injury and its cause. Plaintiffs did not file an administrative claim with the HHS until nearly five years after Mr. Gould's death and nearly two years after receiving confirmation of the attending physicians' work status. It was six and a half years after the injury before suit was initiated in federal court. Such delays by the plaintiffs surely put defendants at a disadvantage in defending the suit against them.

other driver was an agent of the federal government.

The rule which plaintiffs now propose would establish an exception that would change all precedence as to when a medical malpractice action accrues, and would be against the clear admonition in Kubrick that courts should carefully construe the statute of limitation for the FTCA so as not to extend the limited waiver of sovereign immunity beyond that which congress intended. Id. at 117-18. Such a holding would greatly expand the rule that was unsuccessfully proposed by the dissent in Wilkinson, because it would place no burden upon a plaintiff or a plaintiff's attorney to exercise reasonable care, to investigate or to take any action to determine the

employment status of an alleged tort-feasor.

The well-established rule is that once a perspective plaintiff learns of his injury, he is on notice that there may have been an invasion of his legal rights and that he should investigate whether another may be liable to him. Zeleznik v. United States, 770 F.2d 20, 22 (3rd Cir. 1985), cert. denied, 475 U.S. 1108 (1986).[5]

While Wilkinson and Henderson, unlike Baker, arguably differ from the present facts because there was no indication that the defendants in the case sub judice were federal employees, Wilkinson and Henderson indicate that plaintiffs have an affirmative duty to

[5]We, of course, have no occasion to address the law where the injury is fully revealed but the tortfeasor is unknown and not readily identifiable.

inquire as to the legal identity of the defendant. There is no evidence that Mrs. Gould sought to ascertain or was denied access to information concerning the employment status of the treating physicians prior to the expiration of the limitation period. Neither is there evidence that the treating physicians "held themselves out as agents and employees of the private health facility" so as to mislead or deceive the plaintiffs or otherwise hide their legal identity as federal employees. Kubrick, Baker, Wilkinson and Henderson stand for the proposition that a cause of action accrues once the existence of an injury and its cause are known. The statute of limitations under the FTCA commences to run from the date of accrual and does not wait until a

plaintiff is aware that an all alleged tort-feasor is a federal employee.

The Second Circuit held in Kelley v. United States, 568 F.2d 259, 262 (2d Cir.), cert. denied, 439 U.S. 830 (1978), that when the government intentionally delays in order to invoke the statute of limitation, the statute is tolled.[6] In the case at bar,

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[6]Several courts have held in automobile accident cases involving federal employees that the strict two-year statute of limitation should not bar claims in federal courts when a state court action or an administrative claim was initiated before the two-year period expired, thereby giving the government notice of such a claim within the limitation period. See, e.g., McGowan v. Williams, 623 F.2d 1239 (7th Cir. 1980); Chambly v. Lindy, 601 F. Supp. 959 (N.D. Ind. 1985); Harris v. Burris Chemical, 490 F. Supp. 968 (N.D. Ga. 1980). Such exceptions are not universally recognized in the federal courts. Moreover, an exception of this nature would not apply in this case since the plaintiffs did not initiate their first action until more than two years after the death of Mr. Gould.

however, there is no evidence that the government stalled the discovery process or otherwise blocked plaintiffs from obtaining information within the limitation period. Indeed, the evidence is to the contrary. While it is true that the employment status of the attending physicians was not made known to plaintiffs at the time treatment was given, it is also true that plaintiffs made no inquiry as to the physicians' employment status until August 1983. When asked, the government responded promptly to plaintiffs' request for this information. Unfortunately, such requests were not made until the statute of limitation had expired. The district court correctly observed: "With the death and its cause discovered on September 4, 1980, due diligence is not present when an initial inquiry about

who employed the tort-feasors is made 35 months later and then instituting the administrative tort claim two years after the inquiry."

The facts indicate that plaintiffs failed to exercise due diligence. Indeed, there is nothing in the record to suggest that prior to August 1983 plaintiffs' counsel made any effort to investigate the legally significant facts which plaintiffs contend would have been undiscoverable even if due diligence had been exercised. This argument, it seems, impliedly concedes that plaintiffs failed to exercise due diligence in investigating the elements of their claim. Plaintiffs have failed to meet their burden and duty of exercising due diligence.

The government is under no obligation to notify every prospective

plaintiff of its identity and involvement through its employees in all potential legal actions. Van Lieu v. United States, 542 F. Supp. 862, 866 (N.D.N.Y. 1982). The burden is on the plaintiff to discover the employment status of the tort-feasor and to bring suit within the applicable limitation period. See Dessi, 489 F. Supp. at 725 ("It is the plaintiff's burden, once he knows of his injury and its cause, to determine within the limitations period whether or not to file suit."); Zaleznik 770 F.2d at 23 (once a party learns of his injury he is put on notice of a potential claim and "the burden is upon him to determine within the limitations period whether any party may be liable to him").

It will not suffice for plaintiffs to assert baldly that "even due

diligence would not have discovered the fact that the physicians" were federal employees. The burden is on plaintiffs to show that due diligence was exercised and that critical information, reasonable investigation notwithstanding, was undiscoverable.[7] No evidence was

[7]In oral argument, plaintiffs' counsel excused plaintiffs' failure to exercise due diligence prior to August 1983 by suggesting that Mrs. Gould was reluctant to relive this tragic episode through litigation, and it was not until the Spring or Summer of 1983 that Mrs. Gould felt sufficiently fortified to press forward with her claim. While one is sympathetic to her plight, this is not a legally recognized justification for sleeping on one's claim. As the court acknowledged in Sexton v. United States, 832 F.2d 629, 636 (D.C. Cir. 1987):

> [A]ny statute of limitations that puts inquiry burdens on a plaintiff, as this one clearly does, see Kubrick, 444 U.S. at 123 & n.10, 100 S.Ct. at 360 n.10, entails a degree of ghoulish behavior. Patients or survivors, whose instinct may well be to shut off from their minds the grim

offered to support the assertion that "critical facts" were undiscoverable. Indeed, the government's prompt response to plaintiffs' request for information contradicts this contention. No impediment, other than plaintiffs' inaction, shielded the physicians' legal identity. In summary, there is neither allegation nor evidence that the government delayed, mislead or otherwise obstructed plaintiffs in determining the attending physicians' employment status.

> experience through which they have passed, are required instead to follow up on their leads. For persons of any sensitivity this must be a difficult or even repugnant process. Yet, to protect defendants from stale claims, legislatures put potential plaintiffs to the hard choice of proceeding with such inquiries or risking loss of possible claims.

Plaintiffs' construction of the limitation statute would obviate the necessity of due diligence, even when the injury and its cause are known and a minimum inquiry would have led plaintiffs to discover in a timely manner the employment status of the treating physicians. This approach would remove incentives for the timely investigation and prompt presentation of claims and would enable a plaintiff to maintain a FTCA action against the government years after plaintiff's injury and its cause are well known if, for any reason, it escaped the plaintiff's attention -- even absent reasonable investigation -- that the alleged tort-feasor was a government agent acting within the scope of his employment. An open-ended rule would

vitiate the very purpose of the statute of limitations.

The plaintiffs further contend that their claim should not be barred by the statute of limitations because they were "blamelessly ignorant" of the federal government's involvement, and such involvement could not have been presumed, implied or discovered, even after the exercise of due diligence. The Eighth Circuit, in Wollman v. Gross, 637 F.2d 544, 548-49 (8th Cir. 1980), cert. denied, 454 U.S. 893 (1981), rejected the suggestion that the doctrine of "blameless ignorance" extends the date of "accrual" until the moment when the plaintiff becomes aware of the defendant's status as a federal employee. The purpose of the statute of limitations is to require the reasonably diligent presentation of tort claims.

This may require a plaintiff to obtain legal counsel promptly and together with counsel discover the critical facts and all of their possible legal ramifications so as to enable the plaintiff to bring suit within a reasonable time. Id. at 549. As stated by the Supreme Court in Kubrick:

> A plaintiff such as Kubrick, armed with the facts about the harm done to him, can protect himself by seeking advice in the medical and legal community. To excuse him from promptly doing so by postponing the accrual of his claim would undermine the purpose of the limitations statute, which is to require the reasonable diligent presentation of tort claims against the Government.

Kubrick, 444 U.S. at 123. See Id. at 128 (Stevens, J., dissenting) ("A plaintiff who remains ignorant through lack of diligence cannot be characterized as 'blameless.'"); Sexton, 832 F.2d at 633.

When the facts of a case become so grave as to alert a reasonable person that there may have been negligence in a patient's treatment, the statute of limitation begins to run against the claimant's cause of action. See West, 592 F.2d at 492-93, quoting Hulver v. United States, 562 F.2d 1132, 1134 (8th Cir. 1977), cert. denied, 435 U.S. 951 (1978). In the case at bar the plaintiffs were immediately aware of the failure to properly diagnose and treat and knew that Drs. O'Rourke and Nathanson were the decedent's attending physicians. With this information of the physicians' errors followed by the patient's death, a reasonable person would have been alerted at the time of the death that such death may have been the result of medical negligence.

We are not unmindful that a strict adherence to the requirements of the statute of limitations provision under the FTCA often works a substantial hardship on plaintiffs and may have a harsh impact on a party innocent of any impropriety. Statutes of limitation often make it impossible to enforce what are otherwise valid claims. Although we recognize the hardship resulting to the plaintiffs in this case, we have no choice but to apply the law as written. To accept plaintiffs' arguments would be rewriting the FTCA to allow broad, open-ended exceptions to Sections 2675(a) and 2401(b). Flickinger, 523 F. Supp. at 1376-77. "Although exceptions to the applicability of the limitations period might occasionally be desirable, we are not free to enlarge that consent to be sued which the Government, through

Congress, has undertaken so carefully to limit." Mann v. United States, 399 F.2d 672, 673 (9th Cir. 1968). See also Wolman, 637 F.2d at 549. As the Supreme Court has instructed, it is clearly the prerogative of Congress, not the judiciary, to reform the terms and scope of waiver of sovereign immunity beyond that which Congress intended. Kubrick, 444 U.S. at 117-19.

"It goes without saying," as the Kubrick Court observed, "that statutes of limitations often make it impossible to enforce what were otherwise perfectly valid claims." Kubrick, 444 U.S. at 125. Yet, they serve important, well-established purposes affirmed throughout our jurisprudence. We are bound to give them effect until such time as the creator of such provisions, the

legislative branch, exercises its prerogative to amend the statute.

AFFIRMED

SPROUSE, Circuit Judge, dissenting:

I respectfully dissent for the reasons expressed in the original majority opinion in this case. Gould v. U.S. Department of Health and Human Services, 884 F.2d 785 (4th Cir. 1989).

(2)

No. 90-611

DEC 12 1990

JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

REGIS ANN GOULD, PETITIONER

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

ROBERT S. GREENSPAN
LOWELL V. STURGILL, JR.
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the applicable two-year limitations statute, 28 U.S.C. 2401(b), barred petitioner's medical malpractice action under the Federal Tort Claims Act.

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OPINIONS BELOW

The en banc opinion of the court of appeals (Pet. App. 78a-119a) is reported at 905 F.2d 738. The panel opinion of the court of appeals (Pet. App. 21a-75a) is reported at 884 F.2d 785. The opinion of the district court (Pet. 1a-12a) is not reported.

JURISDICTION

The judgment of the en banc court of appeals was entered on June 8, 1990. On August 31, 1990, the Chief Justice issued an order extending the time within which to file a petition for a writ of certiorari to and including Saturday, October 6, 1990. The petition for a writ of certiorari was filed on October 9,

1990 (a Tuesday following a Monday holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In late August and early September 1980, petitioner's husband, Gary Francis Gould, received medical care from Dr. O'Rourke and Dr. Nathanson, two physicians employed by the United States Public Health Service.[1] Dr. O'Rourke first treated Gould at the South County Family Health Care Corporation in Anne Arundel County, Maryland. Gould's condition deteriorated. As a result, Dr. O'Rourke admitted him to the Anne Arundel General Hospital, where Drs. O'Rourke and Nathanson treated him. Dr. O'Rourke ultimately diagnosed Gould as suffering from Rocky Mountain Spotted Fever. Gould died in the hospital on September 4, 1980. At that time, petitioner knew her husband's treating physicians and was aware of what she later alleged to be the cause of his death, *i.e.*, the doctors' negligent delay in diagnosing Gould's condition. Pet. App. 81a-84a.

Three years later, on September 2, 1983, petitioner filed a malpractice claim against Drs. O'Rourke and Nathanson before the Maryland Health Claims Arbitration Board.[2] In December 1985, the Board ulti-

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[1] The doctors were members of the National Health Service Corps established under 42 U.S.C. 254(d). As the court of appeals explained, "[t]he purpose of the Corps is to provide health care providers in areas designated as health manpower shortage areas." Pet. App. 81a-82a. Anne Arundel County was such an area.

[2] In response to inquiries by petitioner's attorney made in August 1983, the United States Department of Health and Human Services notified him in early September that the doctors were federal employees when they treated Gould. Pet. App. 83a-84a.

mately dismissed petitioner's claim, concluding that the doctors could not be sued in a state forum because they were employed by the federal government and the alleged malpractice fell within the scope of their employment. Pet. App. 85a-86a; see 28 U.S.C. 1346(b).

2. Meanwhile, in August 1985, petitioner filed an administrative tort claim with HHS under the Federal Tort Claims Act, alleging that the doctors' negligent treatment caused her husband's death. In August 1986, HHS denied the claim on the ground that it was barred by the FTCA's two-year limitations statute, 28 U.S.C. 2401(b). Pet. App. 86a.

In February 1987, petitioner filed this federal court action under the FTCA. In response to HHS's motion to dismiss the action as untimely under 28 U.S.C. 2401(b), petitioner contended that since "the statute of limitations should be tolled until the legal identity of the tortfeasor is known," *i.e.*, September 1983, the action was not time-barred. Pet. App. 8a.

In January 1988, the district court granted the government's motion and dismissed petitioner's action. Pet. App. 1a-14a. The court determined that petitioner's "cause of action accrued on September 4, 1980. At that time, she was sufficiently armed with the knowledge of injury to her decedent and what caused it[,] which is all that [*United States* v. *Kubrick*, 444 U.S. 111 (1979)] demands." Pet. App. 8a. The court also rejected petitioner's claim that "accrual is tolled until she ascertained the legal identity of the tortfeasor." The court pointed out that petitioner

> failed to make any inquiry until August 8, 1983 about the doctor's [*sic*] employment status. Upon doing so, she was promptly informed of

> their status as federal employees. No impediment existed as to determining the doctors' legal identity. With the death and its cause discovered on September 4, 1980, due diligence is not present when an initial inquiry about who employed the tortfeasors is made 35 months later and then instituting the administrative tort claim two years after the inquiry.

Id. at 9a-10a. Accordingly, the court concluded that

> [t]o relieve [petitioner] * * *, through postponement of her cause of action based on an accrual problem, * * * "would undermine the purpose of the limitations statute, which is to require the reasonably diligent presentation of tort claims against the Government."

Id. at 11a (quoting *Kubrick*, 444 U.S. at 123).

3. A divided panel of the court of appeals reversed and remanded, Pet. App. 21a-36a, concluding that "until [petitioner] discovered that O'Rourke was a federal employee * * *, she simply had no indication that O'Rourke and Nathanson were United States Public Health Service employees and thus had no reason to suspect that her claim was governed by the FTCA," *id.* at 35a. In the court's view,

> [t]o deprive [petitioner] of the federal cause of action under these circumstances would be both unfair and contrary to the Supreme Court's decision in *Kubrick* that the FTCA limitation period begins to run only when a claimant becomes aware of the "critical facts" constituting the "cause" of an actionable injury.

Id. at 36a.

Judge Chapman dissented. Pet. App. 37a-75a. After noting this Court's holding in *Kubrick* that a

tort claim in medical malpractice cases accrues when the plaintiff discovers "both his injury and its cause," Pet. App. 49a (quoting *Kubrick*, 444 U.S. at 120), Judge Chapman reasoned that petitioner's claim accrued on the date of her husband's death—September 4, 1980. At that time, Judge Chapman stated, petitioner was "sufficiently armed * * * with the 'critical facts' to investigate the claim and present it within the two-year statute of limitation." Pet. App. 51a. He rejected the majority's suggestion that "cause" necessarily includes the legal identity of the tortfeasor, *id.* at 52a n.3 (citing *Zeleznik* v. *United States*, 770 F.2d 20, 23 (3d Cir. 1985), cert. denied, 475 U.S. 1108 (1986)), and pointed out that the court's rule would release plaintiffs from the duty to "investigate or to take any action to determine the employment status of an alleged tortfeasor," Pet. App. 60a. Here, Judge Chapman determined,

> [t]here is no evidence that [petitioner] sought to ascertain or was denied access to information concerning the employment status of the treating physicians prior to the expiration of the limitation period. Neither is there evidence that the treating physicians "held themselves out as agents and employees of the private health facility" so as to mislead or deceive the plaintiffs or otherwise hide their legal identity as federal employees."

Id. at 61a-62a. In these circumstances, Judge Chapman concluded, the district court correctly dismissed petitioner's claim as barred by the two-year limitations period.

4. The court of appeals granted the government's suggestion of rehearing en banc, and, by a 9-1 vote, affirmed the district court's order dismissing petitioner's action. Pet. App. 78a-119a. Judge Chapman,

writing for the en banc majority, rearticulated the reasoning of his panel dissent. *Id.* at 79a-119a.[3]

ARGUMENT

1. Petitioner principally contends (Pet. 9-22) that, under the rationale of *United States* v. *Kubrick*, 444 U.S. 111 (1979), the applicable two-year statute of limitations of the FTCA, 28 U.S.C. 2401(b), did not begin to run until she learned that the United States was the employer of the alleged tortfeasors. In *Kubrick*, this Court held that it was sufficient for accrual of an FTCA claim in a malpractice case that the plaintiff "was aware of his injury and its probable cause." 444 U.S. at 118. In so holding, the Court explained that "a plaintiff's ignorance of his legal rights," *i.e.*, whether the facts may constitute legal malpractice actionable in tort, should not be treated identically for purposes of the statute of limitations as "his ignorance of the fact of his injury or its cause." *Id.* at 122. An individual who does not know the fact of his injury or its cause often is unable to file a lawsuit due to no fault of his own, because his injury may be "unknown or unknowable until the injury manifests itself" and "the facts about causation may be in the control of the putative defendant, unavailable to the plaintiffs or at least very difficult to obtain." *Ibid.* By contrast, an individual who is "in possession of the critical facts that he has been hurt and who has inflicted the injury * * * is no longer at the mercy of the latter." *Ibid.* Rather, as the Court pointed out, "[t]here are others who can tell him if he has been wronged, and he need only ask." *Ibid.*

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[3] Judge Sprouse, the author of the panel majority opinion, dissented for the reasons expressed in that opinion. Pet. App. 119a.

In this case, as the en banc court of appeals correctly determined, information about the doctors' employment status is not a "critical fact" that left petitioner "at the mercy of the alleged tortfeasors." *Kubrick*, 444 U.S. at 122. Armed with knowledge of the alleged tortfeasor's identity, "the odds are" (*ibid.*) that a plaintiff such as petitioner will be able to discover, through reasonably diligent investigation, who should be a defendant. *Ibid.* Here, petitioner knew the alleged tortfeasors' identities, and to learn the identify of their employer, she "need only [have] ask[ed]." *Ibid.* Indeed, HHS promptly provided her with that information when she finally did ask for it, see Pet. App. 84a, and petitioner can point to nothing in the record that would have prevented her from requesting this information before the limitations period had run, see *id.* at 112a.[4] It is thus apparent that petitioner failed to exercise due diligence in pursuing her claim. *Kubrick* does not call for releasing a plaintiff—who, like petitioner, is aware of the injury and the alleged tortfeasor's identity—from his duty to investigate the claim and to make an inquiry "whether another may be liable to him." Pet. App. 105a; see, *e.g.*, *Zeleznik* v. *United States*, 770 F.2d at 22.

Contrary to petitioner's suggestion, there is no material distinction between lack of knowledge of an

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[4] As the en banc court of appeals noted, there is no evidence that "the treating physicians 'held themselves out as agents and employees of the private health facility' so as to mislead or deceive [petitioner] or otherwise hide their legal identity as federal employees." Pet. App. 106a. Thus, the cases dealing with fraudulent concealment or misrepresentation cited by petitioner (Pet. 19-20), including *Van Lieu* v. *United States*, 542 F. Supp. 862, 866 (N.D.N.Y. 1982), are not in point.

alleged tortfeasor's legal relationships with other potential defendants and any number of other facts relevant to an FTCA action that plaintiffs would label as "critical" in order to excuse late-filed claims.[5] Thus, petitioner's reading of *Kubrick* would undermine the "deliberate balance" Congress struck in the FTCA "whereby a limited waiver of sovereign immunity is conditioned upon the prompt presentation of tort claims against the government." Pet. App. 91a. For that reason, the courts of appeals have rejected the position petitioner espouses here. See, *e.g.*, *Zeleznik* v. *United States*, 770 F.2d at 23-24; *Dyniewicz* v. *United States*, 742 F.2d 484, 486-487 (9th Cir. 1984); *Diminnie* v. *United States*, 728 F.2d 301, 303-306 (6th Cir.), cert. denied, 469 U.S. 842 (1984); *West* v. *United States*, 592 F.2d 487, 492-493 (8th Cir. 1979).[6]

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[5] For example, a plaintiff might seek to excuse a late-filed claim by arguing that he was unaware of jurisdictional facts necessary to institute the lawsuit in the proper court, *e.g.*, the defendant's principal place of business, or against the proper defendant, *e.g.*, the defendant's legal corporate representative.

[6] Petitioner's reliance (Pet. 20) on *McGowan* v. *Williams*, 623 F.2d 1239 (7th Cir. 1980), and *Chambly* v. *Lindy*, 601 F.Supp. 959 (N.D. Ind. 1985), is baffling. In *McGowan*, the court of appeals held only that "an action brought against a federal driver in state court within the time limitation of [Section] 2401(b) is timely for purposes of the [FTCA] when the action is removed to federal court pursuant to Section 2679." 623 F.2d at 1244. In *Chambly*, the district court merely refused to dismiss plaintiff's FTCA action where the government had failed to respond to a timely filed administrative claim. 601 F. Supp. at 964. Finally, petitioner's citation (Pet. 20) to *Harris* v. *Burris Chem., Inc.*, 490 F. Supp. 968 (N.D. Ga. 1980), is off the mark, since that case involved the jurisdictional requirement of exhausting administrative remedies under the FTCA.

2. Petitioner also contends that, where a plaintiff has "no reasonable knowledge" that the federal limitations statute applies, the Fifth and Tenth Amendments "prohibit the application of [that statute] when a state statute of limitations was complied with by the prosecuting parties." Pet. 25. Petitioner's reliance on the Tenth Amendment is frivolous, since the FTCA's two-year statute of limitations—by virtue of the Supremacy Clause—preempts any inconsistent state law. See *Felder* v. *Casey*, 487 U.S. 131 (1988). And that federal limitations provision, which reflects "the balance struck by Congress in the context of tort claims against the Government," *Kubrick*, 444 U.S. at 117, plainly satisfies the demands of the Due Process Clause. As this Court has recognized, a statute of limitations, "although affording plaintiffs what the legislature deems a reasonable time to present their claims, [also] protect[s] defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence." *Ibid.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

ROBERT S. GREENSPAN
LOWELL V. STURGILL, JR.
Attorneys

DECEMBER 1990

☆ U. S. GOVERNMENT PRINTING OFFICE: 1990 282061 20243